90-1648

Supreme Court, U.S.
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

KEHR PACKAGES, INC.
JAMES MCMURTRIE
CHARLES MCMURTRIE
EMILY MCMURTRIE,

Petitioners,

v.

FIDELCOR, INC.
FIDELITY BANK, N.A.
THOMAS DONNELLY
NEIL COHEN
JAMES NOON
MARIO GIANNINI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOEL HARVEY SLOMSKY, ESQUIRE
1600 Market Street
Suite 1720
Philadelphia, Pennsylvania 19103
(215) 568-3700

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

QUESTIONS PRESENTED

1. May a bank, its separate departments, and its parent holding companies, all of which played a role in furtherance of some aspect of criminal activity, be associated in fact to form a RICO "enterprise" under 18 U.S.C. Section 1961(4)?

2. Is a (19) nineteen month period in which respondents engaged in a series of mail fraud offenses, with the threat of future criminal activity present from the time of the occurrence of the first acts, a sufficient period of time to comprise either closed or open-ended conduct forming a pattern of racketeering activity under 18 U.S.C. Sections 1961(1) and (5)?

PARTIES TO THE PROCEEDING

The names of the parties appearing in the caption of the case were parties to the proceeding in the United States Court of Appeals For The Third Circuit and the United States District Court For The Eastern District of Pennsylvania.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (A1-A40) is officially reported at 926 F.2d 1406. The Memorandum of the United States District Court is not officially reported.

JURISDICTION

The Judgment of the Court of Appeals was filed on March 6, 1991. A Petition for Rehearing was denied on March 27, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 1961(4) provides:

> "(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;"

Title 18, United States Code, Section 1961(5) provides:

> "(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;"

STATEMENT OF THE CASE

Petitioners Kehr Packages, Inc. ("Kehr"), James McMurtrie, Charles McMurtrie and Emily McMurtrie filed suit in August, 1989, against Fidelcor, Inc., Fidelity Bank, N.A. ("Fidelity"), Thomas Donnelly, Neil Cohen, James Noon, and Mario Giannini. The Complaint contained both RICO and pendent state law claims arising from a fraudulent promise to lend money to Kehr. The substantive grounds for the RICO claims were allegations of mail fraud in violation of 18 U.S.C. Section 1341.

The United States District Court for the Eastern District of Pennsylvania dismissed Petitioners' Complaint for lack of subject matter jurisdiction, to wit, the RICO factual claims were not sufficiently alleged (A42).[1] For the same reason, the District

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1. Petitioner has filed a separate Appendix in this appeal.

Court also denied Petitioners' motion for leave to file an amended complaint, which had attached a proposed amended complaint (A48-A71).

Petitioners appealed the dismissal of the Complaint to the United States Court of Appeals for the Third Circuit. On March 6, 1991, the Third Circuit affirmed the dismissal of the Complaint. The Court of Appeals held first that for appellate purposes the Order dated May 14, 1990 of the District Court must be treated as a dismissal pursuant to Rule 12(b)(6), F.R. Civ. P.,[2] and therefore all factual allegations in the amended Complaint and all reasonable inferences that can be drawn from them must be treated as true.[3]

On the merits, the Court of Appeals held that a "pattern" was not sufficiently alleged in the complaint because the element of "continuity" was not satisfied. Viewing the scheme as open-ended, there was no threat of future criminal activity. Even viewing the scheme as closed-ended, the Court found that because Respondent Donnelly's conduct did not constitute mail fraud, the remaining illegal activity alleged did not occur over a long enough period to constitute continuous long-term fraudulent activity posing a threat of additional repeated criminal conduct.

In addition, the Court of Appeals dismissed Petitioners' claim against Fidelity under 18 U.S.C. Section 1962(c) for another reason.[4] Under this Section, courts have held that an

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2. F.R. Civ. P. 12(b)(6) allows a respondent to file a motion to dismiss a complaint for failure to state a claim upon which relief can be granted.

3. In the amended Complaint, Petitioners dropped Fidelcor, Inc. and Mario Giannini, Esquire, counsel to the bank, as defendants because after limited discovery the cause of action against them could not be supported in good faith. Moreover, the RICO claim was changed from being alleged generally in one count to being alleged in four counts as violations of 1962(a), (b), (c) and (d), respectively. The Court of Appeals held, *inter alia*, that the dismissal by the District Court of the claims under 1962(a) and (b) was appropriate. Disagreement between the majority and dissent in the Court of Appeals arose over the dismissal of the 1962(c) and (d) claims. Petitioners seek reinstatement of the 1962(c) and (d) claims through the instant Petition, which are alleged in Counts III and IV of the proposed amended Complaint (A60-A62).

4. 18 U.S.C. Section 1962(c) provides in relevant part that: "It shall be unlawful for any person employed by or associated with any enterprise . . . to

entity cannot be both an "enterprise" and a "person" or defendant. Because the Court of Appeals believed that Fidelity had been named both as a defendant and enterprise, it could not be held liable under Section 1962(c).[5]

Petitioners sought and were denied rehearing in the Court of Appeals on March 27, 1991 (A41). This Petition followed.

The facts pertinent to this appeal as set forth in the amended Complaint (A5O-A58) are as follows:

On December 12, 1986, the McMurtries entered into an agreement to purchase Kehr. Fidelity agreed to provide $4,165,000 in financing secured by the assets and accounts of Kehr, and by real estate owned by Charles McMurtrie and his wife Emily McMurtrie. The terms of the loans ranged from five to seven years. Neil Cohen and James Noon handled this loan package for Fidelity. At that time, Cohen was a commercial loan officer at the bank, and Noon was a vice-president.

The original understanding of the parties was that Fidelity would provide, as part of the total $4,165,000 loan, a credit line of $350,000 to be used as working capital for Kehr. The eventual loan agreement included a $600,000 line of credit to be used as working capital, and to finance closing costs and pay off Kehr's prior debts. However, at the settlement on December 12, James McMurtrie discovered that this line of credit would be insufficient to fund the necessary $350,000 in working capital. During the settlement, Cohen and Noon, on behalf of Fidelity, made an oral commitment to lend an additional $185,000 for working capital. Cohen and Noon knew that Kehr would operate at a deficit during 1987, and that the working capital would be critically important. In reliance on this commitment, the McMurtries closed the deal and began operating Kehr.

NOTES *(Continued)*

conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ."

5. In the Petition for Rehearing filed in the Third Circuit, Petitioners pointed out that in the proposed amended Complaint Fidelity Bank, standing alone, was *not* the specified "enterprise," but had been combined with its parent holding companies and departments to form a group that was associated in fact as the enterprise. See paragraph 61 of amended Complaint (A58).

Between December, 1986 and August, 1987, Cohen and Noon informed James McMurtrie by telephone numerous times that the $185,000 would be available as promised. However, Cohen and Noon had no intention of providing the money and made such commitments in order to induce Petitioners to complete the settlement and to insure that Respondent Fidelity Bank would be the recipient of large monthly interest payments, profits and collateral. Between December, 1986 and July, 1988, Fidelity mailed Kehr invoices for the loan payments and, in return, Kehr mailed to Fidelity the monthly check.

By August, 1987, Cohen and Noon had left Fidelity. In September, responsibility for the Kehr loan was transferred to Thomas Donnelly, a vice-president of Fidelity. The McMurtries believed Donnelly was a high level management consultant who had lending authority. In reality, he worked in Fidelity's Asset Recovery Group, where he was responsible for protecting and recovering the bank's assets. James McMurtrie repeatedly demanded that Fidelity furnish the additional loan as promised, and Donnelly said that he would review the credit file and terms and conditions of the loans to determine whether additional funds would be advanced by Fidelity.

In addition, Donnelly told James McMurtrie that he would commission an appraisal of Kehr's assets, and asked McMurtrie to draft a "plan of attack" demonstrating how Kehr's financial situation could be improved. According to the amended Complaint, this request was part of the course of conduct of Mr. Donnelly aimed at misleading Petitioners into believing that he would attempt to secure additional working capital when his real purpose was to prepare for foreclosure on the assets of the company and the personal assets of the McMurtries. Donnelly never intended to secure additional working capital, and in fact had no lending authority.

In the summer of 1988, the McMurtries found a buyer for Kehr. Fidelity apparently had the contractual right to approve the sale, and Donnelly met with the prospective buyer on July 20, 1988. At this meeting, Donnelly announced that the Kehr loans were in default, and also disclosed for the first time that he worked in the Asset Recovery Group. On the same day,

Donnelly mailed Kehr a notice of default and confessed judgment against the collateral. The buyer continued with the transaction, but Donnelly and Fidelity undermined the agreement of sale by unreasonably delaying approval of the sale, despite knowing that the buyer faced a specific deadline. As a result, the buyer withdrew its offer. In September, 1988, Donnelly ordered Kehr to cease operations and liquidate its assets.

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals For The Third Circuit Has Rendered A Decision On The Components Of A RICO "Enterprise" In A Manner That Conflicts With The Decisions Of Other Courts Of Appeals.

Under 18 U.S.C. Section 1962(c), it is unlawful for any "person" employed by or associated with any "enterprise" to conduct or participate in the conduct of an enterprise's affairs through a pattern of racketeering activity. Most Courts of Appeals have held that the same entity cannot serve simultaneously as both the "person"[6] and "enterprise" under Section 1962(c). *Banks v. Wolk*, 918 F.2d 418, 421 (3d Cir. 1990); *Odishelidze v. Aetna Life and Casualty Co.*, 853 F.2d 21, 23 (1st Cir. 1988); *Bennett v. United States Trust Co.*, 770 F.2d 308 (2nd Cir. 1985), *cert. denied* 474 U.S. 1058 (1986); *United States v. Computer Science Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied* 459 U.S. 1104 (1983); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122 (5th Cir. 1986); *Masi v. Ford City Bank and Trust Co.*, 779 F.2d 793 (7th Cir. 1985); *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982), *cert. denied* 464 U.S. 1008 (1983); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1396 (9th Cir. 1986); *Garbade v. Great Divide Mining and Milling Corp.*, 831 F.2d 212 (10th Cir. 1987); *Yellow Bus Lines, Inc. v. Local Union 639*, 883 F.2d 132, 139-140 (D.C. Cir. 1989).

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6. "Person" is defined in 18 U.S.C. Section 1961(3) to include "any individual or entity capable of holding a legal or beneficial interest in property."

The holdings of these cases rely upon the legislative history of RICO, which was designed to prevent the infiltration and control of legitimate businesses by criminals, who would thereafter conduct the affairs of the business through predicate acts. Under this circumstance, the enterprise is considered to be a passive actor or victim and therefore is not liable for damages flowing from the illegal operations in which it is engaged. *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2nd Cir. 1985); *B.F. Hirsh, Inc. v. Enright Refining Co.*, 751 F.2d 628, 633 (3d Cir. 1984). The logic of these holdings does not apply in a case such as the instant one, where the bank is an active wrongdoer as evidenced by the conduct of its employees.

In any event, the Courts of Appeals differ over what combination of entities or affiliated corporations may constitute an enterprise under 18 U.S.C. Section 1961(4). At a minimum, an enterprise must be a "continuing unit" with an "ascertainable structure distinct from the pattern of racketeering activity." *United States v. Turkette*, 452 U.S. 576 (1981).

In *Haroco, Inc. v. American National Bank and Trust Company*, 747 F.2d 384 (7th Cir. 1984), *aff'd. on other grounds*, 473 U.S. 606 (1985), the Court sustained the propriety of making a bank a defendant and its parent corporation the enterprise. The bank was the culpable party and conducted its racketeering activity through the affairs of its parent corporation. As the Seventh Circuit stated at p. 402: ". . . we think it virtually self-evident that a subsidiary acts on behalf of, and thus conducts the affairs of, its parent corporation . . ." (footnote omitted).

In *NCNB Nat. Bank of North Carolina v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987), the Fourth Circuit reached the opposite conclusion. In that case, the Court followed its earlier holding that a "person" is not distinct from an "enterprise" when a corporation and its wholly owned subsidiary are involved, citing *United States v. Computer Sciences Corp., supra* at 1190-1191. In the *NCNB Nat.* case, the only evidence in the record as to the relationship between the parent and the subsidiary was the fact that the former received a substantial portion of its revenues as dividends from the latter.

In *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438 (5th Cir. 1987), the Fifth Circuit rejected a claim by borrowers

that a defendant bank, its holding companies and three employees constituted an "association in fact" enterprise. To establish an "association in fact" enterprise under 18 U.S.C. Section 1964(4), a plaintiff must show "evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit." *United States v. Turkette, supra.* In *Atkinson,* the Fifth Circuit noted at p. 441:

> "The record here contains no evidence that the bank, its holding company, and the three employees were associated in any manner apart from the activities of the bank. Plaintiffs wholly failed to establish the existence of any entity separate and apart from the bank. In this case, the alleged racketeering activity forming the predicate of the RICO charges was mail fraud—the mailing of false statements requesting payment of interest in excess of the agreed amount. The mailing of loan statements was an activity of the bank. There is no evidence of any other activity on the part of the alleged enterprise.
>
> In addition, there was no evidence presented that the five associates functioned as a continuing unit or formed an ongoing association. No connection was shown between the three individuals and the holding company. The only fact implicating the holding company in the alleged association was its purchase of shares of plaintiffs' notes from the bank. Reasonable jurors could not have found the existence of an enterprise separate and apart from the bank. The district court correctly set aside the jury's finding of a RICO violation."

See also *Montesano v. Seafirst Commercial Corp.,* 818 F.2d 423, 427 (5th Cir. 1987).

In two other Courts of Appeals cases, an "association in fact" enterprise was upheld in circumstances similar to the instant case. In *Atlas Pile Driving Co. v. DiCon Financial Co.,* 886 F.2d 986, 995-996 (8th Cir. 1989), a mortgage lender and its affiliated real estate development corporation were sued as persons conducting an "association in fact" enterprise composed

of themselves and other related entities involved in the construction and sale of two residential housing projects. Subconstructors sued the mortgage lender for participating in a scheme to defraud them of payment for their materials and labor. The Court held that the enterprise alleged had an existence apart from the members of which it was comprised and was a valid collective entity. Corporations may be considered associations in fact for purposes of RICO. See generally, *Yellow Bus Lines, Inc. v. Local Union 639, supra* at 140-141.

Even the Third Circuit has upheld the validity of a combination of corporations comprising an association in fact enterprise. In *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989), Shearin alleged that she was hired by Hutton Trust as an officer and Trust Counsel. Hutton Trust and Hutton, Inc. were wholly owned subsidiaries of Hutton Group. Shearin alleged that Hutton, Inc. and Hutton Group agreed upon a scheme whereby Hutton Trust would be created as a front for the purpose of charging fees to customers of Hutton, Inc. for trust services which were never performed, thereby bilking customers of the brokerage firm. Each defendant entity received funds from the scheme. Shearin alleged that she was dismissed in order to prevent her from making disclosures about the illegal activities.

In *Shearin*, defendants named in a claim under Section 1962(c) were Hutton Group and Hutton Inc. individually. This fact alone did not lead to dismissal of this claim, since the enterprise was a different entity. As the Third Circuit noted at pp. 1165-1166:

> "Shearin pleaded the existence of an enterprise. Paragraph 14 of the complaint states that 'the association of Hutton Group, Hutton Inc., and Hutton Trust . . . was an enterprise under 18 U.S.C. 1961(4) [sic].' This allegation fits the statutory definition of an enterprise as including 'any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.' 18 U.S.C. Sec. 1961(4). Interpretation of this term has been liberal, and

nothing precludes an association of corporations for illicit purposes from constituting an enterprise. . ."

In this case the "enterprise" under Section 1961(4) is described in paragraph 61 of the amended Complaint as follows (A58):

"61. Fidelity Bank and the parent holding companies, Fidelcor, Inc. and First Fidelity Bancorporation, and the Commercial Loan Department and Asset Recovery Group, together were all associated in fact and formed an enterprise as defined in 18 U.S.C. Section 1961(4)."

The Complaint alleged that Fidelcor, Inc., located in Pennsylvania, the original parent holding company of Fidelity Bank, merged with First Fidelity Bancorporation, located in New Jersey. The merger occurred on February 29, 1988, in the middle of the scheme, and created a new parent holding company, First Fidelity Bancorporation.

The amended Complaint details the fraudulent activities of Fidelity Bank and its employees who worked in the bank's Commercial Loan Department and Asset Recovery Group. In addition, the amended Complaint described in paragraphs 47 and 48 the involvement of the parent holding companies as follows (A56):

"47. Defendant Fidelity Bank's parent holding companies, Fidelcor Inc. and First Fidelity Bancorporation, conducted and continues to conduct an internal loan audit review which monitors and rates the loans of its subsidiaries. The loan review group of the parent holding company is independent of the lending units and management structure of subsidiary Fidelity Bank.

84. As a direct result of the audit of the loan to Kehr Packages, Inc. described herein conducted by the audit review group of Fidelcor Inc. and First Fidelity Bancorporation, credit reports were prepared which were relied upon by some and/or all defendants in implementing the scheme to defraud Plaintiffs."

Accordingly, the amended Complaint contains sufficient factual averments to show that the bank, its departments and their parent holding companies played roles in furtherance of the fraudulent scheme. The enterprise had the characteristics of a shared and common purpose, an ongoing organization, and its components functioned as a continuing unit. Under these circumstances, a valid RICO enterprise existed. Thus, the Third Circuit erred in holding that Fidelity Bank was the RICO enterprise and under Section 1962(c) could not be a RICO defendant.

Given the conflict that exists in the Courts of Appeals on the components of a RICO "enterprise," a writ of certiorari should be granted in order to afford Your Honorable Court the opportunity to resolve this matter.

2. The Court Of Appeals For The Third Circuit Has Interpreted The RICO Pattern And Its Constituent Element Of Continuity In A Way That Conflicts With This Court's Decision In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989)

Under 18 U.S.C. Section 1961(1) and (5), a "pattern of racketeering activity" requires the commission of at least two predicate offenses.

In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 106 L.Ed.2d 195 (1989), this Court squarely rejected the notion that this definition of pattern requires an allegation and proof of multiple "schemes" and instead adopted a flexible approach. It is "continuity" plus "relationship" of racketeering activity which combines to produce a pattern. Both tests depend heavily on the specific facts of each case.

"Continuity" of racketeering activity was described by this Court as both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct which by its very nature projects into the future with a threat of repetition.

As this Court succinctly stated in often quoted language: "A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates

extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement . . . In such cases liability depends on whether the threat of continuity is demonstrated." "Long-term criminal activity can be established either by proof that the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, or that the acts are part of an ongoing entity's regular way of doing business. Long-term associations that exist for criminal purposes can establish continuity."

A. The Pattern Of Mail Fraud Offenses Alleged In The Amended Complaint Satisfies The Requirements Of A Close-Ended Scheme

In the instant case the Third Circuit has seized upon the above language from *H.J. Inc.* and interpreted it in a way that eradicates the notion that a closed period of repeated conduct extending over a substantial period of time may constitute close-ended continuity. The amended Complaint alleged that Respondents, in carrying out their scheme, engaged in numerous acts of mail fraud, 18 U.S.C. Section 1341, during a nineteen month period from December, 1986 to July, 1988. This period of time is more than adequate to establish a closed-ended continuity occurring over a substantial period of time. As the dissent to the Third Circuit opinion points out, closed-ended continuity is primarily a question of duration, with the bottom line of a few weeks or months being insufficient to establish closed-ended continuity. See, i.e., *Marshall-Silver Construction Co., Inc. v. Mendel*, 894 F.2d 593 (3d Cir. 1990) (less than seven months insufficient) and *Banks v. Wolk*, 918 F.2d 418 (3d Cir. 1990) (eight months insufficient).

Apparently recognizing that a nineteen month period would be sufficient, the Third Circuit incorrectly reduced the length of time of the closed-ended continuity by (10) ten months by eliminating the time that Respondent Thomas Donnelly, an employee of the bank, was part of the scheme. This is accomplished in two ways. First, by discounting Donnelly's actions as not being fraudulent, and second, by describing the mailings as

"innocent," with the continuity test requiring that the focus be on the instances of deceit in the underlying fraudulent scheme.

Insofar as Donnelly is concerned, the Third Circuit inappropriately considers his conduct in isolation. Donnelly's conduct should be viewed in light of what Petitioners knew when Donnelly became part of the scheme. Respondents Cohen, Noon and Fidelity Bank initiated this fraudulent scheme through misrepresentations which caused Petitioners to put over four million dollars worth of assets at risk. When Donnelly joined the scheme as a coconspirator as alleged, he continued the misrepresentations. He said he would review the credit file and terms and conditions of the loan and have a new appraisal completed, all to determine whether additional funds could be advanced as working capital. In fact, contrary to his word, Donnelly had a "knockdown" appraisal done in order to determine the liquidation value of the assets. The amended Complaint alleged that at no time did Donnelly ever intend to assist Petitioners in obtaining additional working capital.

Under the mail fraud statute, 18 U.S.C. Section 1341, the law has long been established that a scheme to defraud may consist of suggestions and promises as to the future, when not made in good faith but with deceptive intent. *United States v. Herr*, 338 F.2d 607, 610 (7th Cir. 1964); *United States v. Comyns*, 248 U.S. 349 (1919).

Here, Donnelly engaged in such conduct. He did so to lull Petitioners into a false sense of believing that additional financing may be available to allow the business to survive. While Petitioners relied upon Donnelly's false promises, ten additional monthly payments were made on the loans containing large amounts of interest. As part of the scheme, Donnelly's object was to secure this money and then at a future date to "pull the plug" and force a liquidation. This is hardly conduct becoming a friendly banker.[7]

Furthermore, the Third Circuit appears to concede that the mailing of not only the invoices for payment but also the *return*

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7. The deception inherent in seeking a "plan of attack" and not disclosing that he worked in the Asset Recovery Group was all part of the scheme to defraud.

check to the bank is a sufficient mailing under Section 1341. "Innocent" mailings satisfy the mailing element and each mailing incident to an essential part of the scheme constitute a new violation. *Schmuck v. United States,* 489 U.S. 705, 715 (1989), *Pereira v. United States,* 347 U.S. 1, 8 (1954). The Third Circuit overlooks, however, the fact that Petitioners' factual allegations demonstrate that an inference can be drawn that monthly mailings were made almost in tandem with the false representations and omissions of Noon, Cohen and Donnelly over the nineteen month period. There was constant interplay between the bankers and Petitioners, who have no burden of showing that false statements were made exactly on the date of the mailings. These mailings were intrical to the overall scheme to enrich Respondents.[8] Under these circumstances the dissent in the Third Circuit correctly notes that the mailings were not really innocent and it confuses the analysis of what constitutes the fraudulent scheme to consider them as "innocent."

b. The Pattern Of Mail Fraud Offenses Alleged In The Complaint Also Satisfies The Requirements Of An Open-Ended Pattern

The Third Circuit also viewed the Complaint filed in this case as not alleging facts showing a threat of racketeering activity beyond the *end* of the completed scheme alleged and, as a result, held that open-ended continuity is absent.

In reaching this conclusion, critical points inherent in the *H.J. Inc.* holding are overlooked. Whether future criminal activity is threatened should be determined by examining the activity at the time of the occurrence, rather than through a hindsight evaluation when the scheme is at an end. *Morrow v. Black,* 742 F. Supp. 1199, 1207 (E.D.N.Y. 1990). "That racketeering activity lasts in actuality only a few weeks and then is

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8. As to Respondents Donnelly and Fidelity Bank, additional mailings were alleged, including the mailing of two letters in regard to payment of principal and interest and a "Notice of Default" and confessed judgments against the properties pledged as collateral for the loans (A56).

ceased because the participants are found out would not necessarily mean that at the time the activity took place, it had not threatened future criminal activity." *Id.* at 1207.

Here, if Petitioners had uncovered the scheme after ten or twelve months and then filed suit under RICO, it could be alleged in the complaint that future misrepresentations by the bankers and continued mailings of the invoices and payments would constitute the threat of future criminal activity. The same allegation is true had the scheme been uncovered at or near the time of settlement on the loan when the initial outright misrepresentations were made.

The fact is that by the Third Circuit misapplying the precepts of *H.J. Inc.*, the wrongdoers – Respondents – are being rewarded for allegedly ending the scheme on July 20, 1988 when Donnelly announced that he worked in the Asset Recovery Group and declared the loans in default.[9] These facts ended the scheme only in the context of viewing it as closed-ended. But these facts do not diminish the magnitude of the past conduct in this case which by its nature projected into the future with the threat of repetition. This conduct is sufficient to establish "continuity" under the *H.J. Inc.* test, *supra.*

Whether the fraudulent scheme alleged in the amended Complaint is considered to be close-ended over an eight, ten or nineteen month period, it is still sufficient to meet the requirements of continuity. The same is true if the illegal scheme is viewed as open-ended. Under these circumstances, it is apparent that the clues set forth in *H.J. Inc.* are inadequate to foster a meaningful concept of pattern among the lower federal courts. Further clarification is needed to afford them guidance in determining what acts constitute a RICO pattern.

In summary, this case amply demonstrates what the Honorable Antonin Scalia noted in his dissent in *H.J. Inc.* – "that at least a few months of racketeering activity (and who know how

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9. Needless to say, the effects of the scheme continue to date. As alleged in paragraph 56 of the amended Complaint, Respondents have seized personal bank accounts and assets of Petitioners; have executed and attempted to execute judgments on the real estate of Charles and Emily McMurtrie; have sold the real estate and machinery and equipment of Kehr Packages, Inc.; garnished rents, and forced the McMurtries to declare bankruptcy (A58).

much more?) is generally for free, as far as RICO is concerned." 106 L.Ed.2d at 217.

CONCLUSION

For all of these reasons, Petitioners respectfully request that their Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

Joel Harvey Slomsky

JOEL HARVEY SLOMSKY, ESQUIRE

Attorney for Petitioners

No. 90-1643

Supreme Court, U.S.
FILED
APR 25 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

KEHR PACKAGES, INC.
JAMES MCMURTRIE
CHARLES MCMURTRIE
EMILY MCMURTRIE,

Petitioners,

v.

FIDELCOR, INC.
FIDELITY BANK, N.A.
THOMAS DONNELLY
NEIL COHEN
JAMES NOON
MARIO GIANNINI,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOEL HARVEY SLOMSKY, ESQUIRE
1600 Market Street
Suite 1720
Philadelphia, Pennsylvania 19103
(215) 568-3700

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

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Filed March 6, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1396

KEHR PACKAGES, INC.,
CHARLES and EMILY McMURTRIE,
and JAMES McMURTRIE,

Appellants

v.

FIDELCOR, INC.,
FIDELITY BANK, THOMAS DONNELLY,
NEIL COHEN, JAMES NOON, and
MARIO GIANNINI, ESQ.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 89-06219)

Argued November 6, 1990

Before: SLOVITER, *Chief Judge**
SCIRICA and ALITO, *Circuit Judges*

(Filed March 6, 1991)

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*The Honorable Dolores K. Sloviter became Chief Judge of the Third Circuit on February 1, 1991.

JOEL H. SLOMSKY, ESQ. (Argued)
DiGiacomo & Slomsky
1626 Pine Street
Philadelphia, Pennsylvania 19103

Attorney for Appellants

WALTER WEIR, JR., ESQ. (Argued)
Patterson & Weir
Land Title Building, Suite 1200
Broad and Chestnut Streets
Philadelphia, Pennsylvania 19110

Attorney for Appellees

OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

This case requires us once again to address the question of what constitutes a "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.A. §§ 1961-68 (1984 & Supp. 1990). The district court held that plaintiffs did not sufficiently allege such a pattern. We will affirm.

Plaintiffs Kehr Packages, Inc. ("Kehr"), James McMurtrie, Charles McMurtrie, and Emily McMurtrie filed suit against Fidelcor, Inc., Fidelity Bank, N.A. ("Fidelity"), Thomas Donnelly, Neil Cohen, James Noon, and Mario Giannini. The complaint contained both RICO and pendent state law claims arising from an allegedly fraudulent promise to lend money to Kehr. The substantive grounds for the RICO claims were allegations of mail fraud in violation of 18 U.S.C. § 1341. The district court permitted defendants to conduct

discovery to determine whether subject matter jurisdiction existed.

Following discovery, defendants filed a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), and a motion for summary judgment. Plaintiffs opposed the motions and filed their own motion for leave to file an amended complaint. The district court granted defendants' motion to dismiss and denied plaintiffs' motion for leave to amend. The court held that plaintiffs had not sufficiently alleged mail fraud, and assuming they had alleged such fraud, the allegations in the complaint did not constitute a "pattern" under RICO. The district court denied plaintiffs' motion for leave to amend on the grounds that the proposed amended complaint would not cure the defects in the original. Plaintiffs now appeal from these rulings.

I. STANDARD AND SCOPE OF REVIEW

Initially, we must decide what legal standard should govern this appeal. Defendants filed a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). The district court granted this motion because it found the RICO claims in plaintiffs' complaints to be legally insufficient. Thus, although the court denominated its order as one under Rule 12(b)(1), it appeared to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief could be granted.

The legal standards governing these two motions are different. A district court can grant a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction based on the legal insufficiency of a claim. But dismissal is proper only when the

claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682 (1946). *See also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974) (claim must be "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy"). Ordinarily, a court must assume jurisdiction over a case before deciding legal issues on the merits. *Bell*, 327 U.S. at 682. A Rule 12(b)(6) dismissal for failure to state a claim is not subject to the same limitations. The claim need not be wholly insubstantial to be dismissed. As this court has noted, "[t]he threshold to withstand a motion to dismiss under [Rule] 12(b)(1) is thus lower than that required to withstand a Rule 12(b)(6) motion." *Lunderstadt v. Colafella*, 885 F.2d 66, 70 (3d Cir. 1989).

In this case, we believe the district court's order should properly have been denominated a dismissal under Rule 12(b)(6), and we will treat it as such. *See Black v. Payne*, 591 F.2d 83, 86 n.1 (9th Cir.) (treating dismissal under Rule 12(b)(1) as one under Rule 12(b)(6)), *cert. denied*, 444 U.S. 867 (1979); *see also Kulick v. Pocono Downs Racing Ass'n, Inc.*, 816 F.2d 895, 899 (3d Cir. 1987) (considering whether to treat Rule 12(b)(1) dismissal as one under Rule 12(b)(6), but declining to reach issue). Although the court did not discuss the legal standards under which it decided defendants' motion, it considered only the allegations in the complaints and found them "lacking." The court also denied plaintiffs' motion for leave to amend because "it fail[ed] to establish

a valid claim under [RICO], and therefore fail[ed] to correct the defects in the original complaint."

A plaintiff may be prejudiced if what is, in essence, a Rule 12(b)(6) challenge to the complaint is treated as a Rule 12(b)(1) motion. When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion. *See Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). On the other hand, under Rule 12(b)(6) the defendant has the burden of showing no claim has been stated. In *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980), we found that transforming a 12(b)(1) motion into a 12(b)(6) motion would "deprive[] the plaintiffs of the procedural safeguards to which they were entitled." *Id.* In this case, however, there is no reason not to treat the motion as having been made under Rule 12(b)(6). In opposing defendants' motion to dismiss, plaintiffs recognized that the motion had been made under Rule 12(b)(1), but stated that "Plaintiffs are treating the Motion of Defendants entitled a 'Motion to Dismiss' as one filed under Rule 12(b)(6)." Memorandum of Law in Support of Plaintiffs Answer in Opposition to Defendants' Motion to Dismiss at 15. In this situation, there is no harm in treating the district court's dismissal as having been made under Rule 12(b)(6). We stress, however, that challenges for failure to state a claim ordinarily should be made under Rule 12(b)(6). *See Bell v. Hood*, 327 U.S. 678, 682 (1946).

The district court denied plaintiffs' motion for leave to amend because the proposed amended complaint would also fail to withstand a motion to dismiss. Denials of leave to amend a complaint under Fed. R. Civ. P. 15(a) are reviewed for abuse

of discretion. *Kiser v. General Elec. Corp.*, 831 F.2d 423, 426-27 (3d Cir. 1987), *cert. denied*, 485 U.S. 906 (1988). However, reversal is proper when the district court bases its denial on an erroneous rule of law. *Banks v. Wolk*, 918 F.2d 418, 419 (3d Cir. 1990); *Centifanti v. Nix*, 865 F.2d 1422, 1431 (3d Cir. 1989).

Since plaintiffs sought to amend their complaint to rectify certain defects, the allegations in the proposed amended complaint are the relevant ones for purposes of this appeal. This fact is not of great significance, since the amended complaint adds little additional information to that contained in the original. One difference is that the amended complaint drops Fidelcor, Inc. and Mario Giannini as defendants; thus, we do not consider any allegations against them. Since we have treated the district court's order as a Rule 12(b)(6) dismissal, we must accept as true all factual allegations in the amended complaint and all reasonable inferences that can be drawn from them. The amended complaint must be construed in the light most favorable to the plaintiffs, and can be dismissed only if the plaintiffs have alleged no set of facts upon which relief could be granted. *Banks*, 918 F.2d at 419.

II. FACTUAL ALLEGATIONS

This case stems from the leveraged buyout of Kehr by James McMurtrie and Charles McMurtrie. The allegations of the amended complaint are as follows. *See* Amended Complaint at ¶¶ 15-31. On December 12, 1986, the McMurtries entered into an agreement to purchase Kehr. Fidelity agreed to provide $4,165,000 in financing, secured by the assets and accounts of Kehr, and by real estate

owned by Charles McMurtrie and his wife Emily McMurtrie. The terms of the loans ranged from five to seven years. Neil Cohen and James Noon handled this loan package for Fidelity. At that time, Cohen was a commercial loan officer at the bank, and Noon was a vice-president.

The original understanding of the parties was that Fidelity would provide, as part of the total $4,165,000 loan, a credit line of $350,000 to be used as working capital for Kehr. *Id.* at ¶¶ 17-18. The eventual loan agreement included a $600,000 line of credit to be used as working capital, and to finance closing costs and pay off Kehr's prior debts. However, at the settlement on December 12, James McMurtrie discovered that this line of credit would be insufficient to fund the necessary $350,000 in working capital. During the settlement, Cohen and Noon, on behalf of Fidelity, made an oral commitment to lend an additional $185,000 for working capital. Cohen and Noon knew that Kehr would operate at a deficit during 1987, and that the working capital would be critically important. In reliance on this commitment, the McMurtries closed the deal and began operating Kehr. *Id.* at ¶ 31.

Between December, 1986 and August, 1987, Cohen and Noon informed James McMurtrie by telephone "numerous" times that the $185,000 would be available as promised. *Id.* at ¶ 32. However, Cohen and Noon had no intention of providing the money, and "made such commitments in order to induce Plaintiffs to complete the settlement and to insure that Defendant Fidelity Bank would be the recipient of large monthly interest payments, profits and collateral." *Id.* at ¶ 33. Between December, 1986

and July, 1988, Fidelity mailed Kehr invoices for the loan payments. Apparently, during this period Kehr's financial situation became increasingly precarious.

By August, 1987, Cohen and Noon had left Fidelity. In September, responsibility for the Kehr loan was transferred to Thomas Donnelly, a vice-president of Fidelity. The McMurtries believed Donnelly was a high level management consultant who had lending authority. *Id.* at ¶ 41. In reality, he worked in Fidelity's Asset Recovery Group, where he was responsible for protecting and recovering the bank's assets. James McMurtrie repeatedly demanded that Fidelity furnish the additional loan as promised, and Donnelly said that he would "review the credit file and terms and conditions of the loans to determine whether additional funds would be advanced by [Fidelity]." *Id.* at ¶ 38. The amended complaint does not allege that Donnelly ever represented that the funds would be provided. In addition, Donnelly told James McMurtrie that he would commission an appraisal of Kehr's assets, and asked McMurtrie to draft a "plan of attack" demonstrating how Kehr's financial situation could be improved. According to the amended complaint, this request was "part of the course of conduct of Mr. Donnelly aimed at misleading Plaintiffs into believing that he would attempt to secure additional working capital." *Id.* at ¶ 42. However, Donnelly never intended to do so, and in fact had no lending authority. In December, 1987, Donnelly mailed two loan invoices to Kehr. *Id.* at ¶ 45.

In the summer of 1988, the McMurtries found a buyer for Kehr. Fidelity apparently had the contractual right to approve the sale, and Donnelly

met with the prospective buyer on July 20, 1988. At this meeting, Donnelly announced that the Kehr loans were in default, and also disclosed that he worked in the Asset Recovery Group. On the same day, Donnelly mailed Kehr a notice of default and confessed judgment against the collateral. The buyer continued with the transaction, but Donnelly and Fidelity "unreasonably delayed" approving the sale, despite knowing that the buyer faced a specific deadline. *Id.* at ¶ 54. As a result, the buyer withdrew its offer. In September, 1988, Donnelly ordered Kehr to cease operations and liquidate its assets.

III. STATUTORY LANGUAGE

The RICO statute authorizes civil suits by "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]." 18 U.S.C. § 1964(c) (1988). Section 1962 contains four separate subsections, each addressing a different problem. Section 1962(a) prohibits "any person who has received any income derived . . . from a pattern of racketeering activity" from using that money to acquire, establish or operate any enterprise that affects interstate commerce. Section 1962(b) prohibits any person from acquiring or maintaining an interest in, or controlling any such enterprise "through a pattern of racketeering activity." Section 1962(c) prohibits any person employed by or associated with an enterprise affecting interstate commerce from "conduct[ing] or participat[ing] . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." Finally, section 1962(d) prohibits any person from "conspir[ing] to violate any of the provisions of subsections (a), (b), or (c)."

In this case, the amended complaint alleges violations of §§ 1962(a), (b), (c) and (d). Case law has established separate requirements for certain subsections. Under § 1962(a), a plaintiff must allege injury specifically from the use or investment of income in the named enterprise. *Rose v. Bartle*, 871 F.2d 331, 357-58 (3d Cir. 1989). *But see Busby v. Crown Supply, Inc.*, 896 F.2d 833, 836-40 (4th Cir. 1990) (rejecting "investment use" rule). Fidelity and its parent companies are the named enterprises in this case. Amended Complaint at ¶ 61. The injury stems from the allegedly fraudulent activities of Noon, Cohen, and Donnelly, but is not specifically linked to the use or investment of income in any named enterprise. Thus, § 1962(a) cannot be a basis for liability in this case. Similarly, under § 1962(b), a plaintiff must allege a specific nexus between control of a named enterprise and the alleged racketeering activity. *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168 n.2 (3d Cir. 1989). Since the amended complaint does not allege such a nexus, the § 1962(b) count also must be dismissed.

The § 1962(c) claim is not subject to these nexus limitations, and therefore is a possible basis for liability here. However, while an entity can be both an enterprise and a defendant for purposes of § 1962(a), such a dual role is impermissible in actions based on § 1962(c). *See Banks v. Wolk*, 918 F.2d 418, 421 (3d Cir. 1990). Fidelity is named as both a defendant and an enterprise. Since § 1962(c) is the only available basis for liability, Fidelity must be dismissed as a RICO defendant. Because Fidelity cannot be a RICO defendant, it cannot be held liable under a

respondeat superior theory for the RICO violations of its employees.[11] *See Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1359 (3d Cir. 1987). We will consider separately the allegations against each individual defendant under § 1962(c).[1]

IV. THE "PATTERN" REQUIREMENT

A "pattern of racketeering activity" requires commission of at least two predicate offenses on a specified list. 18 U.S.C.A. §§ 1961(1), (5) (1984 & Supp. 1990). The predicate acts alleged in this case are instances of mail fraud in violation of 18 U.S.C. § 1341. But a pattern requires more than commission of the requisite number of predicate acts. In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893 (1989), the Supreme Court stressed that a plaintiff must show also "that the racketeering acts are related, *and* that they amount to or pose a threat of continued criminal activity." *Id.* at ___, 109 S. Ct. at 2900 (emphasis in original).

In *H.J. Inc.*, customers of a telephone company alleged that the company had been bribing state regulatory officials to gain approval for excessive telephone rates. This alleged bribery occurred over a six-year period and consisted of cash and in-kind payments, and negotiations for future employment with the company. *Id.* at ___, 109 S.

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1. Because we hold that plaintiffs did not state a valid claim under § 1962(c), *see infra* at 26-31, we need not consider whether the dependent § 1962(d) claim has been properly alleged. *Cf. Rose v. Bartle*, 871 F.2d 331, 365-67 (3d Cir. 1989) (discussing pleading requirements for § 1962(d) claim).

Ct. at 2897. The Court held that these allegations stated a valid claim under RICO.

The Court emphasized that allegations cannot constitute a RICO "pattern" unless they satisfy both the "relatedness" and "continuity" tests. Both tests depend heavily on the specific facts of each case. The Court adopted a broad multi-factor test for relatedness, which focuses on whether the alleged predicate acts "'are interrelated by distinguishing characteristics and are not isolated events.'" *Id.* at ___, 109 S. Ct. at 2901 (quoting Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575(e) (1982), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, § 212(a)(2), 98 Stat. 1987). The Court found that the allegations in *H.J. Inc.* satisfied this test, because the alleged acts of bribery were related by the common purpose of influencing state regulators. *Id.* at 2906.

In discussing the continuity requirement, the Court rejected the theory that a RICO pattern requires proof that a defendant engaged in multiple criminal "schemes." *Id.* at ___, 109 S. Ct. at 2901. The Court noted that the concept of a "scheme" appears nowhere in the statute or its legislative history, and is difficult to define. Rather, related predicate acts in furtherance of a single scheme can constitute a pattern if the acts constitute or present the threat of long-term continuous criminal activity. Proof of multiple schemes is "highly relevant" to the question of continuity, but is not a prerequisite for a finding of a RICO pattern. *Id.*

Of course, not every single scheme comprising two or more predicate acts will constitute a pattern. Continuity refers "either to a closed period

of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at ___, 109 S.Ct. at 2902. A short-term scheme threatening no future criminal activity will not suffice. Although Congress intended a "natural and common-sense approach to RICO's pattern element" and continuity "depends on the specific facts of each case," *Id.* at ___, ___, 109 S. Ct. at 2899, 2902, the Court delineated some parameters of the analysis. The Court stressed that continuity is "centrally a temporal concept." *Id.* at ___, 109 S. Ct at 2902. Thus, the length of time over which the criminal activity occurs or threatens to occur is an important factor. As the Court noted, "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct." *Id.* One method of demonstrating continuity is to show that "the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *Id.* This showing can be made with respect to otherwise legitimate entities, or when "the predicate acts can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *Id.*

This court has also noted other factors that are relevant to the "pattern" inquiry. In *Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987), we focused on "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity." This approach is entirely consistent with *H.J. Inc. See*

Marshall-Silver Constr. Co. v. Mendel, 894 F.2d 593, 596 (3d Cir. 1990). After *H.J. Inc.*, however, "we must focus on these factors as they bear upon the separate questions of continuity and relatedness." *Banks*, 918 F.2d at 423.

In *H.J. Inc.*, the Court found the requisite continuity. The Court first noted that "the racketeering predicates occurred with some frequency over at least a 6-year period, which may be sufficient to satisfy the continuity requirement." 492 U.S. at ___, 109 S. Ct. at 2906. Alternatively, the allegations sufficiently indicated that "the alleged bribes were a regular way of conducting [the defendant's] ongoing business, or a regular way of conducting or participating in the conduct of the alleged and ongoing RICO enterprise." *Id.*

Following *H.J. Inc.*, this court affirmed dismissals in two cases for failure to allege a sufficient RICO pattern. In *Marshall-Silver Construction Co. v. Mendel*, 894 F.2d 593 (3d Cir. 1990), the complaint contained allegations of extortion and mail fraud in connection with the filing of a false bankruptcy petition. We noted that the predicate acts were concluded in less than seven months, and that "the alleged illegal activity posed no threat of *additional* repeated criminal conduct over a significant period." *Id.* at 597 (emphasis in original). In *Banks v. Wolk*, 918 F.2d 418 (3d Cir. 1990), the plaintiffs alleged, among other things, that the defendants had used an inside partner to drive down the price of certain real estate. We found no RICO pattern with respect to those defendants involved only in that scheme, noting that the injury to the plaintiff occurred during an eight month period, and that the scheme "was an attempt to defraud a single

investor of his interest in a single piece of real estate over a relatively short period of time." *Id.* at 11. As in *Marshall-Silver*, we found no indication of additional conduct that would constitute a threat of long-term criminal activity.

In *Swistock v. Jones*, 884 F.2d 755 (3d Cir. 1989), we found the continuity requirement satisfied with respect to an alleged real estate fraud that lasted approximately one year. As we stressed in *Marshall-Silver* and *Banks*, however, the complaint in *Swistock* contained allegations of further misrepresentations by the defendants in regard to other potential transactions with the plaintiffs. *Id.* at 759. *See Marshall-Silver*, 894 F.2d at 597; *Banks*, 918 F.2d at 423. Thus, although a single fraudulent scheme can give rise to RICO liability, when that scheme is short-lived and directed at a limited number of people, this court has required some further indication that the defendant's fraudulent activities are likely to continue.

V. THE MAIL FRAUD ALLEGATIONS AND THEIR EFFECT ON THE PATTERN ANALYSIS

The district court found that the complaints failed to state valid claims of mail fraud. In some RICO cases, it will be clear that a defendant's actions do not constitute a pattern without an examination of the legal sufficiency of the predicate acts. But since the pattern inquiry must assess whether the defendant's actions "amount to or pose a threat of continued criminal activity," *H.J. Inc.*, 109 S. Ct. at 2900, it is often helpful to examine the actions which are alleged to form the basis of criminal activity.

In cases involving allegations of mail fraud, this inquiry is complicated by the nature of the statute. The mail fraud statute prohibits any person from knowingly causing the use of the mails "for the purpose of executing" any "scheme or artifice to defraud." 18 U.S.C.A. § 1341 (Supp. 1990). The actual violation is the mailing, although the mailing must relate to the underlying fraudulent scheme. Moreover, each mailing that is "incident to an essential part of the scheme" constitutes a new violation. *Pereira v. United States*, 347 U.S. 1, 8 (1954). The mailing need not contain any misrepresentations. Rather, "'innocent' mailings — ones that contain no false information — may supply the mailing element." *Schmuck v. United States*, 489 U.S. 705, 715 (1989).

The mailing element is not very helpful in examining the sufficiency of a RICO pattern allegation. The relatedness test will nearly always be satisfied in cases alleging at least two acts of mail fraud stemming from the same fraudulent transaction — by definition the acts are related to the same "scheme or artifice to defraud." But the continuity test requires us to look beyond the mailings and examine the underlying scheme or artifice. Although the mailing is the actual criminal act, the instances of deceit constituting the underlying fraudulent scheme are more relevant to the continuity analysis.

For example, the "number of unlawful acts" is a factor in determining continuity. *Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987). But the continuity question should not be affected by the fact that a particular fraudulent scheme involved numerous otherwise "innocent" mailings, rather than only a few. As the

Court of Appeals for the Seventh Circuit recently has reaffirmed:

> Mail fraud and wire fraud are perhaps unique among the various sorts of "racketeering activity" possible under RICO in that the existence of a multiplicity of predicate acts (here, the mailings) may be no indication of the requisite continuity of the underlying fraudulent activity.

Hartz v. Friedman, 919 F.2d 469, 473 (7th Cir. 1990) (quoting *Lipin Enters., Inc. v. Lee*, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring)). *Accord United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1268 (7th Cir. 1990); *Sutherland v. O'Malley*, 882 F.2d 1196, 1205 n.8 (7th Cir. 1989); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987) (decided before *H.J. Inc.*). *See also Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1278 (7th Cir. 1989) ("the number of [mail or wire fraud] offenses is only tangentially related to the underlying fraud, and can be a matter of happenstance.").

In this case, the loan invoices sent to Kehr constitute the main basis for the mail fraud allegations. But the quantity of otherwise innocent invoices cannot by itself transform defendants' alleged fraud into a RICO pattern. It should not be relevant, for example, that Fidelity sent invoices on a monthly basis, rather than quarterly or yearly. However, if a defendant committed numerous acts of deceit as part of multiple schemes or a single ongoing fraud, this fact would be relevant to the continuity question, although not necessarily dispositive. Moreover, it would be relevant if particular mailings, unlike those in this

case, contained false or misleading statements or otherwise constituted separate deceptive acts.

The importance of focusing in the continuity analysis on deceptive activity rather than otherwise innocent mailings is demonstrated by the holding in *H.J. Inc.* that continuity can be shown when "the predicate acts or offenses are part of an ongoing entity's regular way of doing business." 492 U.S. 229, 109 S. Ct. at 2902. In that case, separate bribes to different government officials sufficiently indicated that bribery was a regular way of doing business for the defendant. *Id.* at 2906. In this case, if we were to focus only upon the mailings, we would necessarily conclude that sending invoices was a regular way of conducting Fidelity's business. Such a holding would extend RICO's scope to all allegations of mail fraud based upon two or more otherwise routine business mailings, a result we believe Congress did not intend. Rather, we must examine whether defendants' underlying deceptive activities constitute a regular way of doing business. This question was not faced in *H.J. Inc.*, since each bribe in that case independently constituted a criminal act, without reference to any underlying illegal scheme.

At this time, we need not decide precisely which types or combinations of fraudulent actions will present the requisite continuity. But we note that the mailings in this case present a different situation from that recently faced by the Court of Appeals for the First Circuit in *Fleet Credit Corp. v. Sion*, 893 F.2d 441 (1st Cir. 1990). In that case, the defendants obtained three separate business loans over a five year period and allegedly misappropriated the collateral for their personal

use. The plaintiff's RICO claim was predicated on acts of mail fraud consisting of 95 checks allegedly used by the defendants to dissipate the collateral over a four and one-half year period. The court found that these actions constituted "long-term criminal conduct" under *H.J. Inc. Id.* at 446-47. The court noted that "[h]ad the number of acts alleged by [the plaintiff] been few or the period of time short, the predicate acts would not have amounted to continued criminal activity." *Id.* at 447.

The court noted, however, that each separate mailing constituted a new breach of the defendants' promise not to remove, transfer, or destroy the collateral. *Id.* at 443. Thus, the defendants' deceptive activities were ongoing during the entire four and one-half year period, and each mailing constituted a new fraudulent act. Moreover, during this period, the defendants applied for and received two new loans. In this case, by contrast, the mailings did not constitute separate fraudulent actions, but related entirely to the initial allegedly deceptive actions of the defendants. We do not believe that the *Fleet* court focused on the number and duration of the mailings without considering their integral connection to the ongoing long-term deceptive activities.[2]

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2. In dicta, the court noted that "[a] threat of criminal activity . . . is not established merely by demonstrating that common law fraud was a regular way of conducting [the defendants'] ongoing business. Rather, [the plaintiff] must demonstrate that the *predicate acts* – here the acts of mail fraud – were a regular way of conducting the ongoing business." *Id.* at 448

We now examine the allegations of deceptive activity in this case. Under the mail fraud statute, a scheme or artifice to defraud "need not be fraudulent on its face, but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978). The scheme need not involve affirmative misrepresentation, *see United States v. Frankel*, 721 F.2d 917 (3d Cir. 1983), but the statutory term "defraud" usually signifies "'the deprivation of something of value by trick, deceit, chicane or overreaching.'" *McNally v. United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). *Accord Carpenter v. United States*, 484 U.S. 19, 27 (1987).

The amended complaint alleges that Cohen and Noon misrepresented on numerous occasions that the additional funds would be provided. Since these appear to be actionable misrepresentations, we will assume without deciding that the amended complaint sufficiently alleges that Cohen and Noon have engaged in a "scheme or artifice to defraud" in violation of the mail fraud statute. We also will assume without deciding that the invoices sent to Kehr satisfy the "mailing" element. Thus, we will

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(emphasis in original). It does not appear that the court was emphasizing the mailings over the underlying fraud. Instead, the court likely was referring to the fact that a plaintiff must sufficiently allege a connection between a particular fraudulent scheme and some mailing. *See id.* at 444-45 (apparently finding that plaintiffs did not sufficiently plead connection between certain allegations of common law fraud and use of mails).

assume that Cohen and Noon have committed predicate acts of mail fraud. We note, however, that the district court held that defendants' actions could not constitute mail fraud because plaintiffs "offer[ed] no evidence to suggest the statements the bank mailed out were inaccurate, or fraudulent in any way." This analysis was incorrect. As the Supreme Court recently held in *Schmuck v. United States*, 489 U.S. 705, 715 (1989), completely "innocent" mailings can satisfy the mailing element.

The allegations against Donnelly are of a different sort. The amended complaint asserts that Donnelly engaged in three separate deceptive actions after Cohen and Noon had left Fidelity. First, Donnelly's request for a "plan of attack" was part of a scheme to "mislead[] Plaintiffs into believing that he would attempt to secure additional working capital." Amended Complaint at ¶ 42. Although Donnelly said that he would attempt to secure additional working capital, unlike Cohen and Noon he never represented that the capital would be provided. Second, Donnelly did not disclose that he worked in the Asset Recovery Group, and that he had no lending authority. Third, he "unreasonably delayed" approving the proposed sale of Kehr.

Even construing the complaint in the light most favorable to appellants, none of these allegations could form the basis for a separate mail fraud violation on the part of Donnelly. We recognize that the mail fraud statute has been "expansively construed." *United States v. Boffa*, 688 F.2d 919, 925 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983). But none of Donnelly's alleged acts or omissions could be "reasonably calculated to

deceive a person of ordinary prudence and comprehension." *Pearlstein*, 576 F.2d at 535. Thus, the individual allegations against Donnelly do not constitute additional criminal activity that would help establish "continuity" under RICO.

The "plan of attack" request falls squarely within the ambit of normal business communications, especially considering the financial state of Kehr, and contains no deceptive elements. *Cf. Blount Financial Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 153 (6th Cir. 1987) (plaintiff's reliance on defendant's quotation of interest rate was unreasonable in business setting, and precluded mail fraud claim); *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir.) (allegations of kickbacks, rebates and illegal rent payments could not be construed as scheme to deceive and thus could not be basis for mail fraud violation), *cert. denied*, ___ U.S. ___, 111 S. Ct. 536 (1990). Likewise, the non-disclosure of Donnelly's job title cannot constitute mail fraud absent further allegations. Since Donnelly never represented that he had lending authority, or that the funds would be provided, his non-disclosure cannot reasonably be said to be deceptive. *See, e.g., United States v. Von Barta*, 635 F.2d 999, 1006-07 (2d Cir. 1980) (non-disclosure not actionable under mail fraud statute absent some duty to disclose), *cert. denied*, 450 U.S. 998 (1981); *see also Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249 (7th Cir. 1989) (absent elaborate efforts at concealment, or larger pattern of misrepre-

sentations or half-truths, mere non-disclosure cannot constitute mail fraud).[3]

Moreover, even if these actions were somehow deceptive, they were calculated only to mislead plaintiffs into believing that Donnelly would "attempt" to secure additional funds. Since Donnelly never indicated that the funds would be provided, there was no deceit nor fraud within the meaning of the mail fraud statute. By contrast, the deceptions of Cohen and Noon are alleged to have caused plaintiffs to close the deal and incur injury when the funds were not provided. We note that 18 U.S.C. § 1346, which amended the mail fraud statute to include schemes that "deprive another of the intangible right of honest services," does not apply to this case, since all of the defendants' alleged actions occurred prior to the effective date of the statute. *See* 18 U.S.C.A. § 1346 (Supp.

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3. Mail fraud can also be predicated on mailings made after the completion of the scheme, but which are "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States v. Lebovitz*, 669 F.2d 894, 896 (3d Cir.), *cert. denied*, 456 U.S. 929 (1982) (*quoting United States v. Maze*, 414 U.S. 395, 403 (1974)). In this case, however, we find as a matter of law that Donnelly's alleged actions could not have served this purpose. A person of ordinary prudence and comprehension could not be misled by Donnelly's indications that he would look into whether Fidelity would provide additional funding. *Cf. Pyramid Securities, Ltd. v. IB Resolution, Inc.*, 1991 U.S. App. LEXIS 1350, *11 (D.C. Cir. Feb. 1, 1991) (rejecting similar "lulling" claim in civil RICO action).

1990) (effective Nov. 18, 1988) (overruling *McNally v. United States*, 483 U.S. 350 (1987)).[4]

Finally, the allegation that Donnelly "unreasonably delayed" approving the sale of Kehr, while possibly amounting to a breach of contract, contains no deception that would bring it within the purview of the mail fraud statute. *Cf. United States v. Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980) ("the [mail fraud] statute does not reject all business practices that do not fulfill expectations, nor does it taint every breach of a business contract. Its condemnation of a 'scheme or artifice to defraud' implicates only plans calculated to deceive."); *see also* Amended Complaint at ¶ 83 (unreasonable delay not alleged as misrepresentation in common law fraud count).

We emphasize that the responsibility for determining the factual sufficiency of fraud allegations remains with the fact-finder. In this case, though, the allegations against Donnelly simply contain no indication of the deception or overreaching which the mail fraud statute requires. We also recognize that appellants

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4. We follow the other Courts of Appeals that have held that § 1346 has no retroactive effect. *See United States v. Telink, Inc.*, 910 F.2d 598, 601 n.2 (9th Cir. 1990); *United States v. Granberry*, 908 F.2d 278, 281 n.1 (8th Cir. 1990); *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir.) (civil RICO case), *cert. denied*, ___ U.S. ___, 111 S. Ct. 536 (1990); *United States v. Bush*, 888 F.2d 1145, 1145-46 (7th Cir. 1989); *United States v. Stewart*, 872 F.2d 957, 960 n.2 (10th Cir. 1989); *Corcoran v. American Plan Corp.*, 886 F.2d 16, 19 n.4 (2d Cir. 1989); *United States v. Davis*, 873 F.2d 900, 902 (6th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 292 (1989).

possibly could have demonstrated at trial that Donnelly was engaged in a common mail fraud scheme with Noon and Cohen. *See, e.g., United States v. Camiel*, 689 F.2d 31, 36 (3d Cir. 1982) (mail fraud violation can be proved by showing common scheme rather than conspiratorial agreement). In this event, Donnelly would have been held liable for the misrepresentations of Cohen and Noon. But for purposes of RICO continuity, the separate allegations against Donnelly do not add to the criminal activity alleged against Cohen and Noon.

VI. THE "PATTERN" ALLEGATION IN THIS CASE

Plaintiffs in this case have not sufficiently alleged that defendants engaged in a "pattern of racketeering activity." Since the complaint alleges numerous acts of mail fraud related to the common purpose of causing Kehr to default on its loans, the relatedness requirement is satisfied. But the amended complaint does not set forth acts that "amount to or pose the threat of continuing criminal activity." Rather, as in *Marshall-Silver* and *Banks*, the allegations here involve a short-term attempt to force a single entity into bankruptcy, and contain no additional threat of continued criminal activity. Nor does this case involve a "long-term association that exists for criminal purposes." *See H.J. Inc.*, 492 U.S. at ___, 109 S. Ct. at 2902.

We have established that the critical acts for purposes of the continuity analysis are the misrepresentations of Cohen and Noon. The same misrepresentations regarding the additional loan were repeated "numerous" times over an eight month period. *H.J. Inc.* holds that the actual or

threatened duration of a scheme is an important factor in determining whether a defendant's actions amount to long-term criminal activity. When mail fraud is alleged, the question of duration becomes more difficult. As we noted in *Marshall-Silver*, "[v]irtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are 'related' by purpose and are spread over a period of at least several months." 894 F.2d at 597. In this case, the length of the scheme as originally conceived was indeterminate, since it would depend on how long Kehr could survive without the promised $185,000 in additional working capital. The mailing of loan invoices could possibly have continued for seven years, the term of the longest loan.

However, we do not place much emphasis on the fact that the mailings might have continued for years. As we have noted, a defendant's deceptive actions are more important to the continuity analysis than otherwise innocent mailings. Thus, the relevant criminal conduct occurred during the initial eight month period, when the misrepresentations were made. We noted in *Marshall-Silver* that the duration of a scheme should not be afforded overriding significance "in the absence of a more significant societal threat." *Id.* Since we found the scheme in that case to be sufficiently short-term, we did not rely on this statement and need not embrace it at this time. *But see United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1268-69 (7th Cir. 1990) (adopting *Marshall-Silver* language). We do hold, however, that in determining the duration of a scheme involving mail fraud, the relevant criminal conduct is the defendant's deceptive or

fraudulent activity, rather than otherwise innocent mailings that may continue for a long period of time. *Cf. United States Textiles*, 911 F.2d at 1268 (noting that each mail and wire fraud count "relates back" to initial extortions, and that duration of transaction at issue was "pure happenstance in light of the underlying concern which is the 'continuity' of the criminal activity").

We must apply a "natural and common-sense approach to RICO's pattern element." *H.J. Inc.*, 492 U.S. at ___, 109 S. Ct. at 2899. Consequently, it should not be important that otherwise innocent mailings might continue long after the deceptive practices cease. If the term of the Kehr loans had been several decades rather than several years, it would not make the initial actions of Cohen and Noon any more deserving of RICO sanctions. *Cf. Dana Corp. v. Blue Cross & Blue Shield*, 900 F.2d 882, 887 (6th Cir. 1990) (repeated fraudulent misrepresentations during seventeen year life of contract sufficient to state pattern). As in *Marshall-Silver* and *Banks*, an eight-month period of fraudulent activity directed at a single entity does not constitute a pattern, absent a threat of future criminal acts.

This case, therefore, is unlike *H.J. Inc.*, which involved six years of bribes directed at five members of a regulatory agency. The alleged bribes were numerous and varied, consisting of cash payments, job negotiations, and payments for meals and entertainment. *See* 492 U.S. at ___, 109 S. Ct. at 2897. Each separate bribe contributed to an ongoing scheme aimed at influencing future ratemaking decisions. This evidence led the Court to find sufficient indication that bribery was a regular way of doing business for the defendant.

Besides the significant disparity in longevity between the schemes in *H.J. Inc.* and the present case, there are other salient differences. First, there is no apparent threat that the misrepresentations of Cohen and Noon would have continued past the time they left Fidelity. By contrast, the regulatory decisions involved in *H.J. Inc.* were a continuous part of the defendant's business, and thus the bribes likely would have continued into the future. Unlike *Swistock*, the additional confirmatory misrepresentations of Cohen and Noon did not concern future transactions, and thus do not pose a threat of additional criminal activity. There is no indication that Cohen or Noon made other false statements to Kehr, or treated other customers in a similar manner. Consequently, the allegations in the amended complaint do not indicate that fraud was "a regular way of doing business" for any defendant. *Cf. H.J. Inc.*, 492 U.S. at ___, 109 S. Ct. at 2902. Nor, as we have noted, does this case involve a "long-term association that exists for criminal purposes." *See id.*

Second, the bribes in *H.J. Inc.* were individually directed at five different officials. As we noted in *Swistock*, the Supreme Court did not rely on the fact that the actual victims of the bribes – the telephone company's customers – were numerous. *See* 884 F.2d at 758. However, it certainly should be relevant that the criminal activity was separately directed at several different people. *Cf. Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987) ("the scheme involved the repetition of similar misrepresentations to more than twenty investors"). In this case, the direct target of the criminal activity

was a single entity. Kehr's individual shareholders and guarantors, and the holders of pledged collateral, were affected only indirectly.

Third, each bribe in *H.J. Inc.* separately contributed to the injury inflicted on the plaintiffs. *Cf. Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986) ("occurrence of distinct injuries" is factor in pattern analysis). In this case, the damage to plaintiffs was largely accomplished at the moment of settlement. Although the number of misrepresentations can be an important factor, the confirmatory misrepresentations made after settlement do not transform the actions of Cohen and Noon into a "pattern of racketeering activity." There is no allegation that Kehr was caused to forgo additional financing because of the false confirmations; on the contrary, a buyer was found for Kehr after Cohen and Noon left Fidelity. Thus, the repeated misrepresentations did not contribute any injury additional to that already inflicted. Nor is it relevant that each loan payment constituted additional economic detriment to Kehr. Absent continuous long-term fraudulent activity, it is of little importance that a particular injury was inflicted over an extended period of time, rather than all at once. *See United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1269 (7th Cir. 1990) ("[I]dentical economic injuries . . . stemming from a single contract were not the type of injuries which Congress intended to compensate via the civil provisions of RICO.").

VII. CONCLUSION

Plaintiffs may have valid claims of common law fraud or breach of contract, but based on the allegations of the complaint and the proposed

amended complaint, which we have assumed throughout are true, they cannot maintain a RICO suit. Thus, we will affirm the dismissal of the RICO and pendent state law claims against all defendants, and the denial of plaintiffs' motion for leave to amend their complaint.

ALITO, *Circuit Judge*, concurring in part and dissenting in part.

I concur in the decision of the court insofar as it affirms the dismissal of the plaintiffs' claims under 18 U.S.C. § 1962(a) and (b), but I would reverse the dismissal of plaintiffs' claims under 18 U.S.C. § 1962(c) and (d). As the majority notes, denial of plaintiffs' motion for leave to amend and the dismissal of their claims may be sustained only if the amended complaint proffered by the plaintiffs failed to state a claim upon which relief could be granted. Majority typescript at 3-6. The majority affirms the dismissal of the claims under 18 U.S.C. § 1962(c) and (d) on the ground that the amended complaint did not sufficiently allege a "pattern" of racketeering activity. I respectfully disagree with the majority's analysis of the pattern requirement and with its application in the present case.

I.

The amended complaint alleged that the bank and several officers carried out a scheme to defraud the McMurtries, who obtained more than four million dollars of secured loans to finance their leveraged buyout of Kehr Packages, Inc. The bank and its officers allegedly induced the McMurtries to enter into loan agreements that provided insufficient working capital for successful operation of the company. This was accomplished, the complaint asserts, by fraudulent oral promises that additional financing would be provided. According to the complaint, the purpose of this scheme was to obtain large interest payments and, ultimately, the pledged collateral, which exceeded the value of the loans. The complaint alleged that the defendants, in carrying out this scheme, committed numerous acts of mail fraud, 18 U.S.C. § 1341, during a period of one year and seven months, from December 1986 to July 1988.

The specific factual allegations in the complaint are set out in the majority opinion (typescript at 6-9), but the following salient allegations merit emphasis. At the settlement of the loans on December 12, 1986, two bank officers, Neil Cohen, a commercial loan officer, and James Noon, a vice president, orally promised that an additional $185,000 in working capital would be provided. App. 241a-42a. For the next eight months, Cohen and Noon repeated this promise during "numerous" telephone conversations with James McMurtrie. *Id.* at 242a. Cohen and Noon, however, never intended to fulfill their promises but made them to obtain interest payments and the pledged collateral for their employer. *Id.* at 243a.

In September 1987, after Cohen and Noon had left the bank, Thomas Donnelly, another vice president, took over responsibility for the loan and began a "course of conduct . . . aimed at misleading plaintiffs into believing that he would attempt to secure additional working capital" when his real purpose was to prepare for foreclosure on the assets of the company and the personal assets of the McMurtries. *Id.* at 243a-46a. To carry out this plan, Donnelly "act[ed] for months on the pretense of being a management consultant" (*id.* at 248a) although he actually worked in the bank's Asset Recovery Group. *Id.* at 245a-46a, 248a. Donnelly promised to look into the question of increased working capital, when in fact he had no intention of doing so. *Id.* at 244a-46a. He also requested that plaintiffs draft a "plan of attack" for profitably operating the company, although he was actually preparing for foreclosure. *Id.* at 245a-46a. Finally, Donnelly undermined an agreement for sale of the company during the summer of 1988 by unreasonably delaying approval of the transaction, and in September 1989 he ordered Kehr to cease operations and liquidate. *Id.* at 248a-49a. I stress that these are merely the unproven factual allegations in the complaint, but at the present stage we are bound to accept them as true. In my view, these allegations sufficiently allege a "pattern of racketeering activity."

II.

The RICO statute, 18 U.S.C. § 1961(1) defines "racketeering activity" to mean any of a long list of predicate offenses, including mail fraud (18 U.S.C. § 1341). The statute states that a "'pattern of racketeering activity' *requires* at least two acts of racketeering activity" (18 U.S.C. § 1961(5))

(emphasis added). The complaint in this case alleges more than two such acts.

In *H.J. Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, 109 S.Ct. 2893 (1989), the Supreme Court held that a "pattern of racketeering activity" must satisfy two additional requirements not mentioned in the statute itself: "relatedness" and "continuity." I agree with the majority that the complaint in the present case satisfied the requirement of "relatedness," and therefore the sole remaining hurdle is the requirement of "continuity."

In *H.J. Inc.*, ___ U.S. at ___, 109 S.Ct. at 2902, the Supreme Court explained that "'[c]ontinuity' is both a closed-and open-ended concept." For present purposes, I think it is helpful to discuss these two concepts in reverse order.

The open-ended concept of continuity refers to a series of predicate acts that is cut short, either by law enforcement efforts or other intervening events, but that threatened long-term criminal conduct. *Id.* In *H.J. Inc.*, the Court gave several examples of how such threatened criminal conduct may be shown. In some cases, the Court noted (*id.*), it may be proven that the perpetrators expressly threatened repeated acts of racketeering. In other cases, the Court observed (*id.*), it may be shown that the predicate offenses were part of an ongoing entity's regular way of doing business, thus giving rise to the inference that such offenses would have continued if not interrupted.

In addition to these examples provided by the Supreme Court, several factors previously identified by this court are useful in determining whether a threat of future racketeering acts has been alleged or shown. Factors such as the number of unlawful acts, the number of

perpetrators, the number of victims, and the character of unlawful activity (*Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3d Cir. 1987)) may be indicative of threatened criminal conduct in particular cases. Based upon all of these factors and examples, I fully agree with the majority that the complaint in the present case does not allege facts showing a threat of racketeering activity extending beyond the end of the completed scheme alleged. I therefore turn to the concept of "closed-ended" continuity.

Although the discussion of this concept in *H.J. Inc.* is brief, the Court's opinion makes clear, in my view, that the predominant, if not sole, consideration in determining whether a closed-ended pattern has been alleged or proven is the duration of the racketeering activity. The Court stated flatly (____ U.S. at ___, 109 S.Ct. at 2902) that "[a] party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." Likewise, the Court observed (*id.*) that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." These statements do not seem to leave room for anything other than a measurement of the duration of the racketeering activity. To be sure, the Court noted (*id.*) (emphasis added) that continuity is "*centrally* a temporal concept," thus perhaps implying that the concept has another peripheral component. The Court, however, provided no clue regarding the nature of any such additional component.

Whether or not closed-ended continuity contains any such additional component, it seems clear that several factors have no place in determining

whether closed-ended continuity has been alleged or shown. First, the absence of any threat of future racketeering activity is irrelevant in determining whether closed-ended continuity is present. The threat of future criminal activity is the essence of open-ended continuity but has no bearing on closed-ended continuity, which refers by definition to repeated conduct that has fully run its course.

Second, many of the factors listed by this court in *Barticheck* and related cases, with the obvious exception of "the length of time" of the criminal conduct (*Barticheck*, 832 F.2d at 39), have no logical connection to closed-ended continuity. *Cf. Banks v. Wolk*, No. 90-1278, slip op. at 12 (3d Cir. Nov. 9, 1990) ("After *H.J. Inc.*, we must focus on these factors as they bear upon the separate questions of continuity and relatedness.") Factors such as the number of unlawful acts, the number of perpetrators, the number of victims, the similarity of the acts, and the societal harm associated with the unlawful activity have nothing to do with the duration of the racketeering activity. In addition, these factors, with the exception of the number of unlawful acts, are not logically related to the ordinary meaning of the term "continuous," which refers to an "uninterrupted extension" in space, time, or sequence. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 493-94 (1971).

Since closed-ended continuity, as described in *H.J. Inc.*, is primarily a question of duration, it is critical to zero in on the line between "a substantial period of time," which may satisfy *H.J. Inc.*, and "a few weeks or months," which do not. ___ U.S. at ___, 109 S.Ct. at 2902. In cases decided after *H.J. Inc.*, this court has upheld the dismissal of complaints alleging racketeering

activity over closed-ended periods of less than seven months (*Marshall-Silver Construction Co., Inc. v. Mendel*, 894 F.2d 593 (3d Cir. 1990)) and eight months (*Banks v. Wolk*, *supra*). Since these periods are substantially shorter than that alleged in the present case, these precedents do not control our decision here.

By contrast, in *Swistock v. Jones*, 884 F.2d 755, 759 (3d Cir. 1989) (emphasis added), the court held that a complaint alleging predicate acts of wire and mail fraud "over a period of approximately fourteen months" was sufficient to show "*either* the existence of a closed-ended period of repeated conduct of sufficient length *or* a threat of continuity. . . ." Although the majority attempts to distinguish *Swistock* based on the presence in that case of open-ended continuity (typescript at 15), I believe the holding in *Swistock* rested on two independent grounds. I read *Swistock* to hold that, even without allegations suggesting the threat of future criminal conduct, the alleged acts of wire and mail fraud extending over 14 months satisfied the pattern requirement by showing closed-ended continuity. Because the complaint in the present case alleges numerous acts of mail fraud extending over an even longer period (19 months), *Swistock* weighs in favor of reversal here.

The relevant legislative history points to the same result. In concluding that the "pattern" element necessitates proof of "continuity," the Supreme Court relied[1] primarily upon the following passage from the Senate Report on RICO (S. Rep. No. 91-617, at 158 (1969) (emphasis added):

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1. *H.J. Inc.*, ___ U.S. at ___, 109 S.Ct. at 2900. *See also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14, 105 S.Ct. 3275, 3285 n.14 (1985).

> The target of [RICO] is . . . not sporadic activity. *The infiltration of legitimate business normally requires* more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

This seminal passage appears to measure "continuity" by reference to the period of time normally required for the infiltration of legitimate business. As the Supreme Court has recognized, preventing the infiltration of legitimate business by organized crime was the major objective expressed during congressional consideration of the RICO statute.[2]

In light of this legislative history, closed-ended continuity should not require racketeering activity extending over a longer period of time than Congress felt would normally be required for the infiltration of a legitimate business by means of the various RICO predicates, such as murder, kidnapping, arson, bribery, or fraud. 18 U.S.C. §§ 1961(1) and 1962(b). It would be anomalous to construe the concept of closed-ended continuity so narrowly that efficient campaigns to infiltrate legitimate businesses – the heart of congressional concern when RICO was originally enacted – are excluded from the coverage of that concept. And there is no reason to suppose that Congress felt

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2. In *United States v. Turkette*, 452 U.S. 576, 591 (1981) (footnote omitted), the Court wrote:

> [T]he legislative history forcefully supports the view that the major purpose of [RICO] is to address the infiltration of legitimate business by organized crime. The point is made time and again during the debates and in the hearings before the House and Senate.

such campaigns ordinarily take longer than 19 months (the period at issue here) or 14 months (the period in *Swistock*). Accordingly, in my view, the 19 month period alleged in this case constituted, in the terminology of *H.J. Inc.*, ____ U.S. at ____, 109 S.Ct. at 2902, a "substantial" period of time, rather than "a few weeks or months," and thus satisfied closed-ended continuity.

III.

Although the complaint in this case alleges acts of mail fraud extending over a period of 19 months, the majority whittles this period down to eight months. The majority achieves this result in two stages. First, the majority concludes that in RICO cases grounded on mail fraud predicates, the duration of the racketeering activity should be measured, not by the duration of the mail fraud violations, which may be based on "innocent" mailings, but by the duration of the "instances of deceit." Majority typescript at 16-20. Second, the majority concludes that the only relevant "instances of deceit" in this case are the alleged misrepresentations of Cohen and Noon, because the allegations against Donnelly, when viewed in isolation, do not establish criminal conduct. Majority typescript at 20-26. I disagree with both parts of this analysis.

The first part of this analysis is inconsistent with the plain language of the RICO statute. The statute, 18 U.S.C. § 1961(1), equates "racketeering activity" with the listed predicate offenses.[3]

3. The statute provides in pertinent part (18 U.S.C. § 1961(1)) that "racketeering activity" means any of a long list of predicates, including "(B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud)."

Therefore the duration of racketeering activity for the purpose of judging closed-ended continuity must equal the duration of the related predicates.

Moreover, even if it were proper in a case with mail fraud predicates to look beyond the duration of the mail fraud violations and measure the duration of the deceitful conduct, the focus of inquiry should be on the fraudulent scheme, not the repetition of fraudulent statements. If a fraudulent scheme is launched convincingly, there may be no need for a repetition of the fraudulent statements made at the outset. But as long as the scheme continues – as long as the original false statements are left uncorrected and victims continue to be deceived – the deceitful conduct must be regarded as continuing. Under the majority's analysis, the deceitful conduct in such a case would apparently be regarded as finished once the original false statements were made – although the deceitful conduct would apparently be regarded as continuing if the original false statements were not entirely convincing and therefore had to be repeated over and over. This approach does not seem to make sense.[4]

The second part of the majority's analysis is also flawed. The majority labors to show that if the allegations against Cohen and Noon are disregarded, the remaining factual allegations

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4. The term "innocent mailings" confuses analysis of the question before us. This is a term of art that was used in *Schmuck v. United States*, ___ U.S. ___, 109 S.Ct. 1443 (1989), and related cases to refer to mailings that contain no false information but form part of the execution of the criminal scheme. *See* ___ U.S. at ___, 109 S.Ct. at 1449. Since such mailings help to execute the criminal scheme, they are not really innocent.

against Donnelly would not establish that he committed mail fraud; the majority then reasons that the allegations against Donnelly should not be considered in calculating the duration of the deceitful activity. Majority typescript at 22-26.

In my view, there is no justification for examining the specific allegations against Donnelly in isolation. Fairly read, the complaint alleges that Cohen and Noon launched the fraudulent scheme with outright misrepresentations and that Donnelly later joined the scheme and perpetuated it by means of statements and conduct that were misleading in light of what Cohen and Noon had said and done before. Consequently, I think it is entirely artificial to judge Donnelly's alleged behavior without considering its claimed role in the entire scheme.

In the present case, the complaint alleged that the fraudulent scheme and the mailings in furtherance of the scheme continued for 19 months. That period, I believe, is ample to show closed-ended continuity.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1396

KEHR PACKAGES, INC.,
CHARLES and EMILY McMURTRIE,
and JAMES McMURTRIE,

Appellants

v.

FIDELCOR, INC.,
FIDELITY BANK, THOMAS DONNELLY,
NEIL COHEN, JAMES NOON, and MARIO GIANNINI, ESQ.

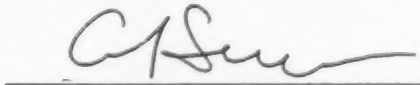
(D.C. Civ. No. 89-06219)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, NYGAARD and ALITO, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,



Circuit Judge

Dated: MAR 27 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEHR PACKAGES, INC., et al	:	Civil Action
Plaintiffs	:	
	:	No. 89-6219
v.	:	
	:	
FIDELCOR, INC. et al	:	
Defendants	:	FILED MAY 14 1990

ORDER

And now, this 14th day of May, 1990, upon consideration of Defendants' Motion to Dismiss and Plaintiffs' Response, and Plaintiffs' Motion to File an Amended Complaint and the Responses of both sides, it is ORDERED that:

1. Defendants' Motion to Dismiss for lack of subject matter jurisdiction is GRANTED; and

2. Plaintiffs' Motion to File an Amended Complaint is DENIED, because it fails to establish a valid claim under 18 U.S.C.A. §1961, et seq., and therefore fails to correct the defects in the original complaint.

ROBERT F. KELLY, J.
United States District Judge

FILED 5/15/90
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEHR PACKAGES, et al.	:	Civil Action
	:	
Plaintiffs,	:	No. 89-6219
	:	
v.	:	
	:	
FIDELCOR, INC., et al.	:	
	:	FILED JUN 28 1990.
Defendants.	:	

MEMORANDUM

R.F. KELLY, J. JUNE 28, 1990

Kehr Packages, a plaintiff in this case, was a Pennsylvania corporation located in Horsham, Pennsylvania which made flexible packaging material made of paper and plastic film. Most of what Kehr Packages made was used by businesses which in turn produced meat, snack foods, and confectioneries. Charles and James McMurtrie, who are also plaintiffs, purchased Kehr Packages in 1986.

The McMurtries purchased Kehr Packages after obtaining a loan from the Fidelity Bank, a defendant in this case. The McMurtries allege that the Fidelity Bank agreed to lend them $4,165,000 to complete the purchase, including a $350,000 line of credit which was to be used as "as working capital with which to operate the business as an ongoing entity."[1] Settlement on the sale occurred on December 12, 1986.

Plaintiffs' case arises out of what happened at the December 12 settlement. Plaintiffs say the settlement was temporarily disrupted when James McMurtrie, who was presumably looking over the loan agreement, noticed that while the Bank was providing a loan in the agreed-upon amount, the Bank was not providing a $350,000 line of credit. At that point, the plaintiffs

1. *See* Plaintiffs' Motion for Leave to File First Amended Complaint, Exhibit A (proposed amended complaint), p. 5.

"recessed the Settlement, and a conference was held" between the McMurtries and two Bank officials.[2] Plaintiffs contend the Bank "made an oral commitment to make an additional loan to plaintiffs in the amount of approximately $185,000" to bring the working capital up to $350,000. With assurances that "only the paperwork" needed to be completed to obtain the additional $185,000, the plaintiffs went ahead with the settlement.[3]

Plaintiffs maintain they never got the extra $185,000 despite what was said at settlement, and contrary to "numerous" phone conversations which took place from the time of settlement through August 1987. Around that time, a new bank officer was given responsibility for their loan,[4] a man plaintiffs thought was "a high level Management Consultant who had lending authority," but who in reality worked in the Asset Recovery Division, where "his function was to protect and/or recover assets of Defendant Fidelity Bank and not to assist Plaintiffs in operating their business."[5]

The Bank declared Kehr Packages' loans in default on July 20, 1988, an announcement which was made at a meeting the plaintiffs attended along with a prospective buyer of the company. Plaintiffs contend this announcement was made "solely for the purpose" of wrecking the proposed sale and as a result, the deal fell through. Subsequently, the Bank ordered layoffs, a cessation of operations, and a liquidation budget. The Bank then seized the plaintiffs' bank accounts and assets, executed or attempted to execute judgments on their real estate, sold the real estate and machinery of Kehr Packages, garnished rents due another company owned by Charles and his wife, Emily McMurtrie, and forced all three McMurtries into bankruptcy.[6]

The plaintiffs claim that the Fidelity Bank never intended to lend them the money for the working capital, but only promised to do so in order to "induce Plaintiffs to complete the settlement and to insure that Fidelity Bank would be the

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2. Neil Cohen, a Commercial Loan Officer, and James Noon, a Vice-President of Fidelity Bank. Both are defendants.

3. Plaintiffs' proposed amended complaint, p. 10.

4. Defendant Thomas Donnelly, a Vice-President of the Fidelity Bank.

5. Plaintiffs' proposed amended complaint, p. 13.

6. Plaintiffs' proposed amended complaint, pp. 17-18.

recipient of large monthly interest payments, profits, and collateral of Plaintiffs."[7] They further allege that when the Bank mailed monthly invoices to the plaintiffs which set forth the amounts of principal and interest due on the loans, the Bank used the United States mails in furtherance of their unlawful objectives. The plaintiffs filed this case on August 24, 1989 and charged the defendants with violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 *et. seq.*, and several pendent state claims including fraud, misrepresentation, and breach of contract.[8]

The defendants filed a Motion to Dismiss for lack of subject matter jurisdiction. Because federal jurisdiction over this case stands or falls on the adequacy of plaintiffs' RICO allegations, I examined only those allegations when I considered the defendants' motion. However, while I did consider the allegations contained in plaintiffs' proposed amended complaint, which were somewhat more specific than the original complaint, I agree with defendants' contention that the amended complaint does nothing to expand the nature of plaintiffs' claim to something which constitutes a valid claim under the RICO statutes.

The theory of plaintiffs' case is this: the Fidelity Bank agreed to lend us an amount of money so we could buy Kehr Packages. The Fidelity Bank did in fact lend us an amount of money, but the amount of money allocated towards working capital was $185,000 less than they agreed to provide. The Fidelity Bank intentionally short-changed us by $185,000 because while they wanted us to proceed with the purchase of Kehr Packages so they could collect substantial monthly payments on the loans, they also wanted us to default on our loans so they could close down our business, liquidate our assets, and drive us into bankruptcy.

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7. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, p. 7.

8. The original complaint contained counts alleging "tortious interference with perspective," "contractual relations," breaches good faith and fair dealing, fiduciary duty, express warranty, and promissory estoppel. Later, the plaintiffs offered an amended complaint which dropped two of the original defendants, two of the state claims, and attempted to plead with more specificity the remaining claims, particularly the RICO claims.

The RICO statute imposes criminal and civil liability upon those engaging in "prohibited activities," which must include proof of either "a pattern of racketeering activity" or "collection of an unlawful debt." *H.J. Inc. v. Northwestern Bell Telephone Co.*, ____ U.S. ____ , 109 S.Ct. 2893, 2897 (1989). "Racketeering activity" can be any act indictable under a federal statute. A "pattern" requires at least two predicate acts within a 10-year period. *Id.*

Plaintiffs attempted to satisfy the requirement of a racketeering act by alleging that the defendants committed mail fraud in violation of 18 U.S.C. §1341. The mail fraud statute provides criminal penalties for devising "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The statute has been expansively construed to prohibit all schemes to defraud by any means of misrepresentation that in some way involves the use of the postal system. *United States v. Boffa,* 688 F.2d 919, 925 (3d Cir. 1982). Plaintiffs contend the bank's mailings of a monthly statement on the loan, and the plaintiffs' payments by check through the mail constitute the predicate acts of mail fraud. It would be fair to say that many Courts have found this theory unconvincing. *See United States v. Kreimer,* 609 F.2d 126 (5th Cir. 1980); *Blount Financial Services, Inc. v. Walter E. Heller & Co.,* 819 F.2d 151 (6th Cir. 1987); *See also, Marshall-Silver Construction Company, Inc. v. Mendel,* 894 F.2d 593 (3d Cir. 1990). In the *Blount* decision, the Court of Appeals for the Sixth Circuit stated that a RICO plaintiff relying on the mail fraud statute must allege false statements "reasonably calculated to deceive a business entity . . . of ordinary prudence and comprehension." *Blount,* supra, at 153.

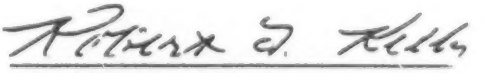
Plaintiffs offer no evidence to suggest the statements the bank mailed out were inaccurate, or fraudulent in any way, or even that the bank was not acting within its rights when plaintiffs' loan was declared in default. Their claims are based on oral promises the defendants allegedly made, not the written communications which passed between the parties. Transforming the rather mundane act of a bank in mailing out a monthly statement into an act of mail fraud, and from there into a

racketeering act, is more an exercise in creative lawyering than an effective allegation in a RICO case.

It is clear the plaintiffs' allegations are also lacking when they are studied in light of the Third Circuit Court of Appeals recent decision in the *Marshall-Silver* case, which examined the "continuity" element in a RICO case. As Judge Stapleton wrote, "virtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are related by purpose and are spread out over a period of at least several months." *Marshall-Silver,* supra, at 597. Given the "natural and common sense approach" to RICO's pattern element that the Supreme Court pointed to in its decision in *H.J. Inc.,* and the Court of Appeals' observation in *Marshall-Silver* that "it is unlikely that Congress intended RICO to apply in the absence of a more significant societal threat." *Id.* at 596, it is clear the plaintiffs' allegations do not support a RICO claim.

Plaintiffs allege the Fidelity Bank's scheme to defraud took place from December 1986 and is continuing to the present. Even accepting the plaintiffs' version of the facts as true, and assuming the Fidelity Bank intended from the beginning of its dealings with the McMurtries to lure them into a bottomless pit of debt so they could foreclose on Kehr Packages and liquidate its assets, there is nothing in this case which would establish "long-term criminal conduct" of the sort the Supreme Court described in *H.J. Inc.* . There is nothing here which would indicate the threat of a repetition of criminal conduct in the future, or a showing that what the Fidelity Bank did to the plaintiffs was the Bank's regular way of conducting its business. *H.J. Inc.,* supra, at 2906; *see also Swistock v. Jones,* 884 F.2d 755 (3d Cir. 1989). For these reasons, I granted defendants' Motion to Dismiss on May 14, 1990.

BY THE COURT:



ROBERT F. KELLY, J.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEHR PACKAGES, INC.	:	
and	:	
CHARLES and EMILY MCMURTRIE	:	
and	:	CIVIL ACTION
JAMES MCMURTRIE	:	NO. 89-6219
	:	
vs.	:	
	:	
FIDELITY BANK, N.A.	:	
and	:	JURY TRIAL
THOMAS DONNELLY	:	DEMANDED
and	:	
NEIL COHEN	:	
and	:	
JAMES NOON	:	

FIRST AMENDED COMPLAINT

Plaintiffs, by their attorneys, Pietro A. Barbieri, Esquire, and Joel Harvey Slomsky, Esquire, respectfully state as follows:

PARTIES

1. Plaintiff, Kehr Packages, Inc., is a Pennsylvania corporation, which conducted its business from its corporate headquarters at 1196 Easton Road, Horsham, Pennsylvania 19044, until about January, 1989. The company manufactured flexible packaging material made of paper and plastic film, principally for the meat, snack food and confectionery industries.

2. Plaintiff, Charles McMurtrie, resides at 1423 Schwenkmill Road, Perkasie, Pennsylvania 18944, and at all times relevant was a principal and fifty per cent (50%) shareholder of the corporation, Kehr Packages, Inc.

3. Plaintiff, James McMurtrie, resides at 2220 Hendrick Station Road, Woxall, Pennsylvania 18979, and at all times relevant was a principal and fifty per cent (50%) shareholder of the corporation, Kehr Packages, Inc.

4. Plaintiff, Emily McMurtrie, is the wife of Plaintiff Charles McMurtrie and resides at 1423 Schwenkmill Road, Perkasie, Pennsylvania 18944.

5. Defendant, Fidelity Bank, N.A. (hereinafter "Fidelity Bank), has its principal place of business at 1200 East Lancaster Avenue, Rosemont, Pennsylvania, and is a national banking association organized and existing under the laws of the United States.

6. Fidelcor, Inc., was a bank holding company duly organized and existing under the laws of the Commonwealth of Pennsylvania and had its principal place of business located at 1200 East Lancaster Avenue, Rosemont, Pennsylvania.

7. On February 29, 1988 Fidelcor Inc. merged with First Fidelity Bancorporation, a bank holding company duly organized and existing under the laws of the State of New Jersey which had its principal offices located in the State of New Jersey.

8. As a result of the merger on February 29, 1988, the holding company First Fidelity Bancorporation was formed. This holding company is duly organized and existing under the laws of the State of New Jersey and has its principal offices located at 550 Broad Street, Newark, New Jersey.

9. Defendant, Thomas Donnelly, is a Vice-President of Defendant Fidelity Bank, and his place of business is located at Broad and Walnut Streets, Philadelphia, Pennsylvania. At all times relevant hereto, Defendant Thomas Donnelly was an agent, employee, servant, and/or officer of Fidelity Bank and employed in the Asset Recovery Group of the Loan Administration Division, and was acting within the scope of his employment and on behalf of Defendant Fidelity Bank.

10. Defendant, Neil Cohen, was a Commercial Loan Officer employed by Defendant Fidelity Bank and his place of business was located in Philadelphia, Pennsylvania. At all times relevant hereto, Defendant Neil Cohen was an agent, employee, servant and/or officer of Defendant, Fidelity Bank and employed in the Commercial Loan Division, and was acting within the scope of his employment and on behalf of Defendant Fidelity Bank.

11. Defendant, James Noon, was a Vice-President of Defendant Fidelity Bank, and his place of business was located in

Philadelphia, Pennsylvania. At all times relevant hereto, Defendant James Noon was an agent, employee, servant and/or officer of Defendant Fidelity Bank, and was acting within the scope of his employment and on behalf of Defendant Fidelity Bank.

JURISDICTION AND VENUE

12. This Court has jurisdiction over the RICO causes of action pursuant to 28 U.S.C. Section 1331 and 18 U.S.C. Section 1964(c).

13. This Court has jurisdiction over the remaining causes of action under principles of Pendent Jurisdiction.

14. Venue of this suit is proper in the Eastern District of Pennsylvania pursuant to 18 U.S.C. Section 1965(a) and 28 U.S.C. Section 1391(b), in that the claims arose in this district and all Defendants or their agents reside in, are found in or transact business in this district.

FACTUAL ALLEGATIONS

15. On or about December 12, 1986, Plaintiffs, James and Charles McMurtrie, entered into an Agreement of Sale to purchase the corporate entity Kehr Packages, Inc., along with all of its real, personal or mixed property, assets and stock.

16. In order to finance the sale described in the preceding paragraph, Plaintiffs, James and Charles McMurtrie, on or about November 7, 1986 made application to Defendant, Fidelity Bank, for financing necessary to complete the purchase and to provide Plaintiffs with at least a ($350,000.00) Three Hundred Fifty Thousand Dollar line of credit to be used as working capital with which to operate the business as an ongoing entity.

17. Plaintiffs requested financing from Defendant Fidelity Bank in the amount of ($4,165,000) Four Million One Hundred Sixty-Five Thousand Dollars which was to be used as follows:

1) $3,750,000 to purchase the stock of Kehr Packages, Inc.

2) $350,000 to replace the existing line of credit as working capital

3) $65,000 to finance estimated closing costs.

18. Defendant Fidelity Bank agreed to finance the acquisition of Kehr Packages, Inc. by Plaintiffs James and Charles McMurtrie under the terms described in the preceding paragraphs. The loan was approved by Defendants Neil Cohen, James Noon and their superiors, all of whom had either negotiated the financing to be provided by Defendant Fidelity Bank or had been involved in reviewing the terms of the loan.

19. Defendants Neil Cohen and James Noon acted on behalf of themselves and Defendant Fidelity Bank, in placing the loan, in structuring the loan and in obtaining collateral from Plaintiffs to secure the loan.

20. With full knowledge of Defendants, the proceeds of the loan were used to purchase the shares and assets of Kehr Packages, Inc. through a leveraged buyout (LBO). A leverage buyout is defined here as a transaction where the bank customer has acquired the majority of stock and assets of another company by having the transaction financed one hundred per cent by the bank, resulting in the customer having a debt equal to the amount of the financing.

21. Defendants Cohen and Noon structured the terms of the loan to conform to the procedures, policies and requirements of Defendant Fidelity Bank. The essential terms relevant here were as follows:

a) A credit line in the amount of $600,000 was approved and secured by accounts receivable and inventory.

b) A term loan in the amount of $2,175,000 was approved with a (5) five year maturity and secured by machinery and equipment.

c) A term loan in the amount of $750,000 was approved with a (5) five year maturity and secured by real estate owned by Charles and Emily McMurtrie as husband and wife.

d) A term loan in the amount of $640,000 was approved with a (7) seven year maturity and secured by the land and building owned by Kehr Packages, Inc. as well as another property known as "Aamco"

owned by Charles and Emily McMurtrie as husband and wife.

e) All loans were also secured by personal guarantees of Charles, James and Emily McMurtrie in the amount of $4,000,000 each.

22. The value of the collateral pledged by Plaintiffs exceeded the value of the $4,165,000 loan by at least $250,000.

23. The $600,000 line of credit made available was to be used specifically to finance all closing costs, to pay off all existing bank debts of Kehr Packages, Inc. incurred by the prior owner, and to provide a $350,000 line of credit as working capital to Plaintiff Kehr Packages Inc. under the new owners, Plaintiffs James and Charles McMurtrie.

24. The various amounts of money ultimately lent to Plaintiffs was the result of Defendants' estimate of those funds necessary to consummate the purchase of Kehr Packages, Inc. and to provide it with sufficient working capital in order to operate the business.

25. Defendants, Fidelity Bank, Neil Cohen and James Noon, knew that after settlement Kehr Packages, Inc. would be required to generate sufficient sales and income in order to pay to Defendant Fidelity Bank minimum monthly payments towards the loans of at least $50,000, for a yearly total payment of at least $600,000.

26. The purchase of the company by James and Charles McMurtrie and the financing of the purchase by Defendant Fidelity Bank occurred on December 12, 1986. Present at settlement were Plaintiffs, James, Charles and Emily McMurtrie and Defendants, Neil Cohen and James Noon, acting on behalf of themselves and Defendant Fidelity Bank.

27. At the settlement described in the preceding paragraph, and prior to its completion, Plaintiff James McMurtrie discovered that there were insufficient funds to complete the transaction and fund the minimum amount of working capital as described in Paragraph 17 in that $350,000 would not be available as working capital to operate Kehr Packages, Inc. Plaintiff James McMurtrie informed Defendants Cohen and Noon that unless he had $350,000 in working capital by way of

the credit line, he could not operate Kehr Packages, Inc. at a profit and would not agree to complete the settlement and purchase of the company.

28. Defendants Cohen, Noon and Fidelity Bank knew at that time, based upon financial information made available to them by Plaintiffs and their own financial projections, that Kehr Packages, Inc. would operate at a cash deficit for 1987. For this reason the necessity of a minimum working capital of $350,000 was even more evident. In fact, the business was doomed to fail without the full amount of working capital.

29. Plaintiffs, James and Charles McMurtrie, recessed the Settlement, and a conference was held among Plaintiffs, James and Charles McMurtrie, and Defendants Neil Cohen and James Noon. At that time and during the conference, Defendants Neil Cohen and James Noon on behalf of themselves and Defendant Fidelity Bank made an oral commitment to make an additional loan to Plaintiffs in the amount of approximately $185,000 in order to provide Plaintiffs with a total of $350,000 in working capital which was to be secured by existing collateral already pledged.

30. The transaction to bring the credit line up to the amount of $350,000 in working capital was to be accomplished by the creation of a new term note in the approximate amount of $185,000, the proceeds of which were to be placed in the line of credit to bring the working capital up to $350,000.

31. Thereafter, and in reliance upon the commitment of Defendants Neil Cohen and James Noon, Plaintiffs James and Charles McMurtrie, now doing business through their corporation, Plaintiff Kehr Packages, Inc., began the operation of their business. This undertaking was initiated in reliance by Plaintiffs on the oral contract of Defendants Noon, Cohen and Fidelity Bank that the additional $185,000 was available and only the paperwork had to be completed to place the funds in the line of credit.

32. From December 12, 1986, the day of settlement, through August, 1987, Plaintiff James McMurtrie had numerous telephone conversations with either Defendants Neil Cohen or James Noon in which Mr. McMurtrie requested that the

additional $185,000 be made available as committed by Defendants. Mr. McMurtrie was informed each time by Defendants Noon and Cohen that the money was available as relied upon.

33. In fact, at no time did Defendants Noon or Cohen intend to fulfill their oral commitment to lend the additional monies to Kehr Packages, Inc. as working capital, but, in fact, made such commitments in order to induce Plaintiffs to complete the settlement and to insure that Defendant Fidelity Bank would be the recipient of large monthly interest payments, profits and collateral of Plaintiffs, all to the benefit of Defendants, Noon, Cohen and Fidelity Bank, and the parent holding company.

34. In furtherance of the scheme and artifice to defraud Plaintiffs, and in furtherance of its objectives as described in the preceding paragraph and those that follow, from December, 1986 to July, 1988, Defendants used the United States mails to mail from Fidelity Bank to Kehr Packages, Inc. monthly invoices setting forth the amounts of principal and interest due and owing on each of the loans made to Kehr Packages, Inc. and caused to be mailed from Kehr Packages, Inc. to Fidelity Bank checks reflecting amounts in payment of principal and interest on the loans.

35. By April and August, 1987, respectively, Defendants Cohen and Noon left their employment at Fidelity Bank and responsibility for the Kehr Packages, Inc. loan file was turned over to a Commercial Loan Officer named James Hayes.

36. Thereafter, and within a few weeks of his assuming responsibility for the loan, in or about September, 1987, Mr. Hayes turned responsibility of the Kehr Packages, Inc. loan over to Thomas Donnelly, a Vice-President of Defendant Fidelity Bank.

37. At this point Plaintiff James McMurtrie repeatedly demanded that Defendants Donnelly and Fidelity Bank comply with the agreement to fund the line of credit to provide working capital of $350,000.

38. In response to these demands of Plaintiff James McMurtrie, Defendant Donnelly promised in person and during numerous telephone conversations that he would review the credit file and terms and conditions of the loans to determine

whether additional funds would be advanced by Defendant Fidelity Bank towards the line of credit as working capital.

39. In this regard, Mr. Donnelly told Plaintiff James McMurtrie that he would have another appraisal done on the machinery and equipment of Kehr Packages, Inc. Mr. Donnelly also told Plaintiff James McMurtrie to draft a "plan of attack" for 1988 to show him how the company could be turned around financially and make a profit if infused with additional working capital in combination with cuts in salaries, personnel and other expenses.

40. Plaintiffs in good faith complied with the requests of Defendant Donnelly and had the reappraisal done and prepared a "plan of attack" for 1988.

41. Neither Defendant Donnelly nor anyone else employed by or acting on behalf of Defendant Fidelity Bank ever informed Plaintiffs that Mr. Donnelly worked in the Asset Recovery Group of the Loan Administration Division and his function was to protect and/or recover assets of Defendants Fidelity Bank and not to assist Plaintiffs in operating their business. Mr. Donnelly had no lending authority and was not a Commercial Loan Officer. Plaintiffs at all times believed that Mr. Donnelly was a high level Management Consultant who had lending authority.

42. Unbeknownst to Plaintiffs, Mr. Donnelly had a "knockdown" appraisal done on the equipment and machinery in order to determine the liquidation value of these assets. The "plan of attack" was another part of the course of conduct of Mr. Donnelly aimed at misleading Plaintiffs into believing that he would attempt to secure additional working capital. In fact, at no time, did Defendant Donnelly ever intend to assist Plaintiffs in obtaining additional working capital.

43. Plaintiffs did not learn that Mr. Donnelly was working for the Asset Recovery Unit until after the bank declared the loans in default in July, 1988.

44. In fact, Defendant Donnelly's strategy with respect to this loan was to lull Plaintiffs into a false sense of security in believing that Defendant Fidelity Bank would fund additional working capital when, in fact, his real purpose was to secure the position of the bank against the existing collateral and personal guarantees of Plaintiffs. Mr. Donnelly knew from his review of

the file that without the additional working capital Kehr Packages, Inc. could not survive financially and would be forced to terminate its operations.

45. Defendants' scheme as described in the preceding paragraphs continued through 1988 and to the present. On December 2 and December 9, 1987, Defendant Donnelly on behalf of himself and Defendant Fidelity Bank, in furtherance of the scheme and artifice to defraud, used the United States Postal Service to mail to Plaintiffs two letters in regard to payments of interest and principal. On July 20, 1988, Defendant Donnelly, on behaif of himself and Defendant Fidelity Bank, in furtherance of the scheme and artifice to defraud, used the United States Postal Service to mail to Plaintiffs a "Notice of Default, and confessed judgments against the properties pledged as collateral for the loans. Defendant Donnelly also used the United States Postal Service to mail to Plaintiffs other letters and mail matter in furtherance of the scheme and artifice to defraud.

46. As a direct and proximate result of the actions of Defendants, Plaintiff Kehr Packages, Inc. was underfinanced and could not meet its expenses, including the repayment of the debt to Fidelity Bank, and payment for sufficient raw materials to produce adequate amounts of inventory and finished goods for sale in order to operate the company and make a profit.

47. Defendant Fidelity Bank's parent holding companies, Fidelcor Inc. and First Fidelity Bancorporation, conducted and continues to conduct an internal loan audit review which monitors and rates the loans of its subsidiaries. The loan review group of the parent holding company is independent of the lending units and management structure of subsidiary Fidelity Bank.

48. As a direct result of the audit of the loan to Kehr Packages, Inc. described herein conducted by the audit review group of Fidelcor Inc. and First Fidelity Bancorporation, credit reports were prepared which were relied upon by some and/or all defendants in implementing the scheme to defraud Plaintiffs.

49. In view of the deteriorating financial position of Kehr Packages, Inc., by the summer of 1988 a buyer or investor was sought to purchase the company.

50. Plaintiffs obtained a ready, willing and able buyer and/or investor for Kehr Packages, Inc. and, upon demand of Defendants Donnelly and Fidelity Bank, Plaintiffs were required to present the buyers or investors to Defendants Donnelly and Fidelity Bank. Plaintiffs complied with Defendants' demand and on July 20, 1988 a meeting was held with the prospective buyer and its principals.

51. At the meeting, Defendant Donnelly announced that Defendant Fidelity Bank was calling the loans due, which had been placed on a "demand" basis, and declaring Plaintiffs in default in repaying the loans. Furthermore, it was announced for the first time by Defendant Donnelly that he had been acting for months on the pretense of being a management consultant, when in fact, he was a Vice-President of Fidelity Bank's "Asset Recovery Group."

52. In spite of these announcements, which were made solely for the purpose of prejudicing the proposed right to transfer the corporate stock, the buyer of corporate stock and investor continued in the transaction. The buyer offered terms that would save the corporation from financial ruin and at the same time cure the default. The terms of the transfer of stock were such as to provide the bank with additional security, without prejudicing its creditor position.

53. Despite knowing that time was of the essence and that the buyer had a specific deadline in purchasing the stock and completing the transaction, Defendant Donnelly on his own behalf and on behalf of Defendant Fidelity Bank requested time to evaluate its position with regard to the transfer by doing an expedited due diligence investigation of the buyer.

54. Thereafter, Defendant Donnelly and Fidelity Bank unreasonably delayed their approval of the transaction, causing the Agreement of Sale to lapse and the buyer to withdraw its offer and causing further damage to Plaintiffs.

55. In September, 1988, Defendant Donnelly contacted Plaintiffs and further exercised control over Plaintiff Kehr Packages, Inc. by ordering the layoff of key personnel, the cessation of all current operations, and the submission of a liquidation budget.

56. Pursuant to the Defendants' scheme to defraud, which is continuing to the present, Defendants have seized personal bank accounts and assets of Plaintiffs Charles, James and Emily McMurtrie; have executed and attempted to execute judgments on the real estate of Charles and Emily McMurtrie; have sold the real estate and machinery and equipment of Kehr Packages, Inc., garnished rents due a company which is two-thirds owned by Charles and Emily McMurtrie, and forced Plaintiffs James, Charles and Emily McMurtrie to declare bankruptcy.

COUNT I

RICO – 18 U.S.C. SECTION 1962(a)

57. Paragraphs 1 through 56 of this Complaint are incorporated by reference as though fully set forth herein.

58. As described above, Defendants, jointly and severally, knowingly and wilfully devised or intended to devise a scheme and artifice to defraud, or to obtain money or property of Plaintiff by means of false and fraudulent pretenses, representations and promises, and in furtherance thereof used and caused to be used the United States mails in violation of 18 U.S.C. Sections 1341 and 2. Defendants participated in the scheme and artifice to defraud with knowledge of its fraudulent nature and with specific intent to defraud Plaintiffs.

59. The acts of mail fraud as described in paragraphs 15 to 56 of this Complaint committed by each Defendant constitute acts of racketeering activity within the meaning of 18 U.S.C. Section 1961(1).

60. Defendants Fidelity Bank, Thomas Donnelly, Neil Cohen and James Noon are "persons" as that term is defined in 18 U.S.C. Section 1961(3).

61. Fidelity Bank, and the parent bank holding companies, Fidelcor, Inc. and First Fidelity Bancorporation, and the Commercial Loan Department and Asset Recovery Group, together were all associated in fact and formed an enterprise as defined in 18 U.S.C. Section 1961(4).

62. At all times relevant to this Complaint, each Defendant was associated with the aforementioned enterprise, the activities

of which affected interstate commerce. The enterprise benefitted from the pattern of racketeering activity described herein.

63. From in or about December, 1986 through the present, Defendants Fidelity Bank, Thomas Donnelly, Neil Cohen and James Noon received or caused to be received income derived directly or indirectly from the pattern of racketeering activity in which they participated as principals or as aiders and abettors within the meaning of 18 U.S.C. Section 2. These funds consisted of the payments of interest and principal to Fidelity Bank by Plaintiffs and other funds obtained by Defendants from Plaintiffs pursuant to collection procedures after declaring the loans in default.

64. Defendants, individually and/or in conspiracy with each other, used and/or invested proceeds of the aforementioned income, directly or indirectly, in the operation of the enterprise described in paragraph 61 in violation of 18 U.S.C. Section 1962(a).

65. Plaintiffs have been injured in their business and property by reason of Defendants' violation of 18 U.S.C. Section 1962(a).

66. As a proximate cause of Defendants' violation of 18 U.S.C. Section 1962(a), Plaintiffs, Kehr Packages, Inc., James McMurtrie and Charles and Emily McMurtrie have suffered and will continue to suffer damages for which Defendants are liable.

WHEREFORE, Plaintiffs, Kehr Packages, Inc., James McMurtrie and Charles and Emily McMurtrie request that judgment be entered in their favor and against all Defendants, jointly and severally, in the amount of at least ($6,000,000) Six Million Dollars, which constitutes actual damages to Plaintiffs, treble damages which would amount to at least ($18,000,000) Eighteen Million Dollars, reasonable attorney's fees, costs of this suit and pre-judgment and post-judgment interest at the highest lawful rate, all as allowed under 18 U.S.C. Section 1964(c).

COUNT II

RICO – 18 U.S.C. SECTION 1962(b)

67. Paragraphs 1 through 66 of the Complaint are incorporated by reference as though fully set forth herein.

68. From in or about December, 1986 through the present, Defendants Fidelity Bank, Thomas Donnelly, Neil Cohen and James Noon, individually and/or in conspiracy with each other, acquired and/or maintained, directly and indirectly, an interest in and control of the enterprise described in paragraph 61 through the aforementioned pattern of racketeering activity in violation of 18 U.S.C. Section 1962(b).

69. Plaintiffs have been injured in their business and property by reason of Defendants' violation of 18 U.S.C. Section 1962(b).

70. As a proximate cause of Defendants' violation of 18 U.S.C. Section 1962(b), Plaintiffs, Kehr Packages, Inc., James McMurtrie and Charles and Emily McMurtrie have suffered and will continue to suffer damages for which Defendants are liable.

WHEREFORE, Plaintiffs, Kehr Packages, Inc., James McMurtrie and Charles and Emily McMurtrie request that judgment be entered in their favor and against all Defendants, jointly and severally, in the amount of at least ($6,000,000) Six Million Dollars, which constitutes actual damages to Plaintiffs, treble damages which would amount to at least ($18,000,000) Eighteen Million Dollars, reasonable attorney's fees, costs of this suit and pre-judgment and post-judgment interest at the highest lawful rate, all as allowed under 18 U.S.C. Section 1964(c).

COUNT III

RICO – 18 U.S.C. SECTION 1962(c)

71. Paragraphs 1 through 70 of the Complaint are incorporated by reference as though fully set forth herein.

72. From in or about December, 1986 through the present, Defendants, Fidelity Bank, Thomas Donnelly, Neil Cohen and James Noon, individually and/or in conspiracy with each other,

conducted and/or participated in the affairs of the enterprise described in Paragraph 61 through the aforementioned pattern of racketeering activity in violation of 18 U.S.C. Section 1962(c).

73. Plaintiffs have been injured in their business and property by reason of Defendants' violation of 18 U.S.C. Section 1962(c).

74. As a proximate cause of Defendants' violation of 18 U.S.C. Section 1962(c), Plaintiffs, Kehr Packages, Inc., James McMurtrie and Charles and Emily McMurtrie have suffered and will continue to suffer damages for which Defendants are liable.

WHEREFORE, Plaintiffs, Kehr Packages, Inc., James McMurtrie and Charles and Emily McMurtrie request that judgment be entered in their favor and against all Defendants, jointly and severally, in the amount of at least ($6,000,000) Six Million Dollars, which constitutes actual damages to the Plaintiffs, treble damages which would amount to at least ($18,000,000) Eighteen Million Dollars, reasonable attorney's fees, costs of this suit, and pre-judgment and post-judgment interest at the highest lawful rate, all as allowed under 18 U.S.C. Section 1964(c).

COUNT IV

RICO – 18 U.S.C. SECTION 1962(d)

75. Paragraphs 1 through 74 of this Complaint are incorporated by reference as though fully set forth herein.

76. From in or about December 1986 through the present, Defendants Fidelity Bank, Thomas Donnelly, Neil Cohen and James Noon, and others combined, conspired, confederated and agreed to commit violations of 18 U.S.C. Sections 1962(a), (b) and (c) as set forth above.

77. It was the plan, purpose and object of the conspiracy to injure Plaintiffs in their business and property as fully described in the preceding paragraphs of this Complaint.

78. In furtherance of the conspiracy, Defendants committed overt acts as described in preceding paragraphs of this Complaint through the roles each Defendant occupied in the conspiracy as aforementioned.

79. Plaintiffs have been injured in their business and property by reason of Defendants' violation of 18 U.S.C. Section 1962(d).

80. As a proximate cause of Defendants' violation of 18 U.S.C. Section 1962(d), Plaintiffs, Kehr Packages, Inc., James McMurtrie and Charles and Emily McMurtrie have suffered and will continue to suffer damages for which Defendants are liable.

WHEREFORE, Plaintiffs, Kehr Packages, Inc., James McMurtrie and Charles and Emily McMurtrie request that judgment be entered in their favor and against all Defendants, jointly and severally, in the amount of at least ($6,000,000) Six Million Dollars, which constitutes actual damages to the Plaintiffs, treble damages which would amount to at least ($18,000,000) Eighteen Million Dollars, reasonable attorney's fees, costs of this suit and pre-judgment and post-judgment interest at the highest lawful rate, all as allowed under 18 U.S.C. Section 1964(c).

COUNT V

FRAUD AND MISREPRESENTATION

81. Paragraph 1 through 80 of this Complaint are incorporated herein by reference and realleged as though fully set forth herein.

82. Defendants have intentionally and with reckless disregard for the truth made material misrepresentations to Plaintiffs. By virtue of the conduct described above, Defendants, Fidelity Bank, Thomas Donnelly, Neil Cohen and James Noon, individually and in conspiracy with each other, have committed fraud and misrepresentations against Plaintiffs, Kehr Packages, Inc., James McMurtrie, and Charles and Emily McMurtrie.

83. Defendants commission of fraud and misrepresentation was intentional, willful and malicious. Defendants' misrepresentations, omissions and fraudulent conduct included, among other things, the following:

a) Defendants Cohen and Noon repeatedly orally committed to Plaintiff James McMurtrie to provide Plaintiff

Kehr Packages, Inc. with an additional line of credit in order to afford the company a working capital of $350,000, when in fact, they never intended to do so.

b) Defendant Donnelly failed to disclose to Plaintiffs that he was employed by the Asset Recovery Group and that his responsibility was to protect and recover collateralized assets and not to advance additional loans to Plaintiffs and assist them in the operation of Kehr Packages, Inc.

c) Defendant Donnelly failed to disclose that he had no lending authority and in fact, led Plaintiffs to believe otherwise.

d) Defendant Donnelly repeatedly told Plaintiff James McMurtrie that Donnelly would determine whether additional working capital could be advanced to Kehr Packages, Inc. after an appraisal was done on the machinery and equipment when, in fact, he never intended to lend any additional funds to the company.

e) Defendant Donnelly failed to disclose to Plaintiffs that this appraisal was also a "knockdown" appraisal and done for the sole purpose of determining the value of the items at a liquidation sale.

f) Defendant Donnelly repeatedly told Plaintiff James McMurtrie that if Mr. McMurtrie submitted a "plan of attack" for 1988 appropriate to Defendant Fidelity Bank, Donnelly would determine whether additional working capital would be advanced to Kehr Packages, Inc. when, in fact, he never intended to lend additional funds to the company.

84. Plaintiffs relied to their detriment on Defendants' material misrepresentations and omissions and was deceived by Defendants' fraudulent conduct. As a result of Defendants' fraudulent actions, Plaintiffs were fraudulently induced and coerced, among other things, to:

a) Rely upon Fidelity Bank and its agents and employees to fund the line of credit to provide $350,000 in working capital.

b) Continue the operation of Kehr Packages, Inc. to their financial detriment when Defendants had no intention of providing the $350,000 working capital.

c) Expend considerable time and money to preserve the business and defend against the fraudulent actions of Defendants.

85. Had Plaintiffs known of the material falsity of Defendants' misrepresentations and the material omissions and had Plaintiffs been aware of Defendants' fraudulent and deceitful conduct, Plaintiffs would:

a) Not have purchased the shares and assets of Kehr Packages, Inc., and

b) Have taken steps to protect Plaintiffs' financial investment in Kehr Packages, Inc. at an earlier stage.

86. As a direct and proximate cause of Defendants' misrepresentations, material omissions and fraudulent conduct, Plaintiffs have suffered and will continue to suffer damages for which Defendants are liable.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against all Defendants, jointly and severally, awarding compensatory and punitive damages, costs of the lawsuit, reasonable attorneys fees, interest and other relief as the Court deems appropriate, all in accordance with the request for judgment set forth in Count I.

COUNT VI

NEGLIGENT MISREPRESENTATION

87. Paragraphs 1 through 86 of the Complaint are incorporated by reference and reallaged as though fully set forth herein.

88. Defendants, their agents, employees and/or servants, negligently and recklessly made false representations concerning material facts and failed to disclose the said material facts where they had a duty to do so. The material facts Defendants misrepresented are set forth in paragraph 83 above.

89. Plaintiffs relied to their detriment on the material misrepresentations and omissions made by Defendants as set forth in paragraph 84 above.

90. As a direct and proximate cause of Defendants' negligent and reckless misrepresentations and omissions, the Plaintiffs have suffered and will continue to suffer damages for which Defendants are liable.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against all Defendants, jointly and severally, awarding compensatory and punitive damages, costs of the lawsuit, reasonable attorneys fees, interest and other relief as the Court deems appropriate, all in accordance with the request for judgment set forth in Count I.

COUNT VII

TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS

91. Paragraphs 1 through 90 of this Complaint are incorporated by reference and realleged as though fully forth herein.

92. By virtue of the aforementioned actions and by failing to act within a reasonable time frame with respect to the prospective sale of Kehr Packages, Inc. to a ready, willing and able buyer, Defendants Fidelity Bank and Thomas Donnelly knowingly, wilfully and maliciously invaded and interfered with the contractual relationship of Plaintiff Kehr Packages, Inc. and the prospective buyer.

93. Defendants Fidelity Bank and Thomas Donnelly did further interfere with the contractual relations between Plaintiff Kehr Packages, Inc. and the prospective buyer by making the aforementioned prejudicial remarks set forth above in paragraph 51 at the meeting among the Plaintiffs, Defendants and the prospective buyer. These actions were made by the Defendants willfully, wantonly, maliciously and with full knowledge of the damage to be created by the actions and statements of the Defendants.

94. Additionally, and because of the unreasonable delay by Defendant Fidelity Bank and its agents and employees in approving the sale of Kehr Packages, Inc., and the financial

arrangements proposed to Defendants by the buyer and Plaintiffs, the latter were unable to consummate a sale of the corporation in 1988 and prevent the termination of the operation of Kehr Packages, Inc. and its financial ruin.

95. As a direct and proximate cause of the actions, inaction and the statements of Defendants, Fidelity Bank and their agents, employees and/or servants, all of which were malicious and intentional, Plaintiffs, Kehr Packages, Inc., James McMurtrie, and Charles and Emily McMurtrie suffered loss of a contractual relation between Kehr Packages, Inc. and a bona fide purchaser resulting in damages for which the Defendants are liable.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against all Defendants, jointly and severally, awarding compensatory and punitive damages, costs of the lawsuit, reasonable attorneys fees, interest and other relief as the Court deems appropriate, all in accordance with the request for judgment set forth in Count I.

COUNT VIII

BREACH OF DEFENDANTS' DUTY OF GOOD FAITH AND FAIR DEALING

96. Paragraphs 1 through 95 of this Complaint are incorporated by reference and realleged as though fully set forth herein.

97. Defendants have breached its covenants of good faith and fair dealing owed to Plaintiffs under its contractual and other relationships with Plaintiff by:

a) Creating an inherently unequal bargaining position to the detriment of Plaintiffs who were required to rely upon Defendants for sufficient funds as working capital with which to operate Kehr Packages, Inc.

b) Taking advantage of Plaintiffs' vulnerable financial position existing by reason of Defendants' failure to provide sufficient funds as working capital with which to operate Kehr Packages, Inc.

c) Refusing to provide truthful and honest replies to Defendants James McMurtrie's request for additional financing so that there was $350,000 in working capital with which to operate the business.

d) Failing to protect Plaintiffs' property and assets by timely approving the sale of Kehr Packages, Inc. when Defendants Fidelity Bank and Thomas Donnelly knew that time was of the essence or the sale would not be consummated by the buyer.

e) Failing to disclose that Defendant Thomas Donnelly was an employee in the Asset Recovery Group with no lending authority.

98. Defendants' conduct, by virtue of the aforementioned actions, constitutes a breach of good faith and fair dealing.

99. Plaintiffs entered into the loan agreement with Defendants in good faith. The Pennsylvania Uniform Commercial Code requires that every contract or duty under the Code imposes an obligation of good faith in its performance or duty. Defendants intentional failure to do the acts set forth in the preceding paragraph served as a breach of that good faith as defined by the Pennsylvania Uniform Commercial Code.

100. As a direct and proximate cause of the Plaintiffs' reasonable reliance upon Defendants' good faith obligations, Plaintiffs have suffered and will continue to suffer damages for which the Defendants are liable.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against all Defendants, jointly and severally, awarding compensatory and punitive damages, costs of the lawsuit, reasonable attorneys fees, interest and other relief as the Court deems appropriate, all in accordance with the request for judgment set forth in Count I.

COUNT IX

BREACH OF CONTRACT

101. Paragraphs 1 through 100 of this Complaint are incorporated by reference and reallaged as though fully set forth herein.

102. By and through the conduct described above, Defendants jointly and severally breached, continue to breach and caused to be breached the oral contracts between Defendants and Plaintiffs to lend an additional $185,000 so that Plaintiffs would have sufficient working capital with which to operate the business.

103. Such breach of contract was purposeful and malicious and done with intent to defraud Plaintiffs.

104. As a result Defendants' breach of contract, Plaintiffs Kehr Packages, Inc., James McMurtrie and Charles and Emily McMurtrie have suffered and will continue to suffer damages for which Defendants are liable.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against all Defendants, jointly and severally, awarding compensatory damages, costs of the lawsuit, reasonable attorneys fees, interest and other relief as the Court deems appropriate, all in accordance with the request for judgment set forth in Count I.

COUNT X

PROMISSORY ESTOPPEL

105. Paragraphs 1 through 104 of this complaint are incorporated by reference and reallaged as though fully set forth herein.

106. Defendants Neil Cohen, James Noon and Fidelity Bank orally agreed and/or promised to lend to Plaintiffs an additional $185,000 in order to bring the working capital up to $350,000 and to induce the Plaintiffs to complete settlement, purchase the stock and assets of Kehr Packages, Inc. and accept the loan of Fidelity Bank.

107. Plaintiffs, in justifiable reliance upon the promises of Defendants completed settlement. Thereafter Defendants failed to provide to Plaintiffs the additional $185,000 working capital as promised, causing Plaintiffs, Kehr Packages, Charles McMurtrie and James and Emily McMurtrie to suffer and to continue suffering damages for which the Defendants are liable.

108. Plaintiffs would not have completed settlement as set forth above but for the oral agreement of Defendants to lend the additional $185,000.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against all Defendants, jointly and severally, awarding compensatory and punitive damages, costs of the lawsuit, reasonable attorneys fees, interest and other relief as the Court deems appropriate, all in accordance with the request for judgment set forth in Count I.

COUNT XI

PUNITIVE DAMAGES

109. Paragraphs 1 through 108 of this complaint are incorporated by reference and reallaged as though fully set forth herein.

110. The actions taken by Defendants as described in this Complaint through fraud and misrepresentation, negligent misrepresentation, tortious interference with prospective contractual relations and breach of duty of good faith and fair dealing and promissory estoppel were willful and malicious and were carried out with reckless disregard for the rights and property of Plaintiffs and with intent to inflict damages on Plaintiffs.

WHEREFORE, Plaintiffs request that judgment be entered in their favor and against all Defendants, jointly and severally, and awarding to Plaintiffs punitive damages for the willful, wanton, deliberate and malicious conduct of Defendants.

Respectfully submitted

PIETRO A. BARBIERI, ESQUIRE

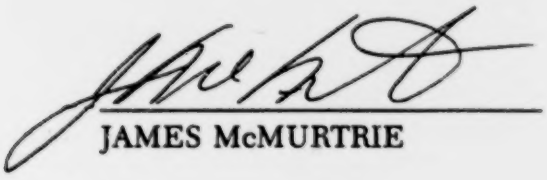
JOEL HARVEY SLOMSKY, ESQUIRE

Attorneys for Plaintiffs
KEHR PACKAGES, INC.
JAMES McMURTRIE
CHARLES and EMILY McMURTRIE

VERIFICATION

I, JAMES McMURTRIE, by these presents swear, attest and affirm that I am sufficiently familiar with the facts contained herein to say that they are true and correct to the best of my knowledge, information and belief.

I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. Sec. 4904 relating to unsworn falsification to authorities.



JAMES McMURTRIE

Dated: March 7, 1990

Supreme Court, U.S.
FILED
MAY 23 1991
OFFICE OF THE CLERK

No. 90-1643

IN THE
Supreme Court of the United States

October Term, 1990

KEHR PACKAGES, INC.
JAMES MCMURTRIE,
CHARLES MCMURTRIE AND EMILY MCMURTRIE,
Petitioners,

v.

FIDELCOR, INC.,
FIDELITY BANK, NATIONAL ASSOCIATION,
THOMAS DONNELLY, JAMES NOON,
NEIL COHEN AND MARIO GIANINNI,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

WALTER WEIR, JR., ESQUIRE
Suite 1200, Land Title Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania 19110
(215) 665-8181

Counsel for Respondents

72 p.

STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Third Circuit's holding that Fidelity Bank could not be both a "person" engaged in racketeering activity and an "enterprise", where the enterprise is alleged to be comprised of an "association in fact" of Fidelity Bank, its commercial loan and asset recovery departments, and its parent and bank holding companies, is consistent with the decisions of other Courts of Appeals?

2. Whether the Third Circuit's focus on factors other than the duration of the predicate acts to determine whether the "pattern" requirement of the RICO statute has been met, is consistent with this Court's holding in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989)?

PARTIES TO THE PROCEEDING

The caption of this case in the Court of Appeals for the Third Circuit is

Kehr Packages, Inc., James McMurtrie,
Charles McMurtrie and Emily McMurtrie

v.

Fidelcor, Inc., Fidelity Bank, National Association
Thomas Donnelly, James Noon,
Neil Cohen and Mario Gianinni

Fidelity Bank, National Association is a wholly owned subsidiary of Fidelcor, Inc. Fidelcor, Inc. is a wholly owned subsidiary of First Fidelity Bancorporation.

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STATUTORY PROVISIONS

In addition to those provisions of the Racketeering Influenced and Corrupt Organizations Act set forth by the petitioners, the following statutory provisions are applicable to the instant petition.

Title 18, United States Code, Section 1962(c) provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Title 18, United States Code, Section 1962(d) provides:

> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT OF THE CASE

This petition involves an action brought under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* ("RICO"). The action was commenced on August 24, 1989, by Kehr Packages, Inc. ("Kehr Packages"), James and Charles McMurtrie, individuals who purchased all of the stock of Kehr Packages in a leveraged buyout in December, 1986, and Charles McMurtrie's wife, Emily McMurtrie, the Petitioners herein. The Petitioners charge a violation of RICO and an assortment of state law claims against Fidelcor, Inc. (the "Parent Company"), its subsidiary Fidelity Bank, National Association ("Fidelity"), James Noon and Neil Cohen, two former loan officers of Fidelity who were involved in the making of a loan to Kehr Packages (the "Loan Officers"), Thomas Donnelly, a Vice President of Fidelity who works in the asset recovery group of Fidelity and who took over the responsibility of monitoring the loan to Kehr Packages after the Loan Officers left Fidelity, and Mario Gianinni, a former associate counsel of Fidelity, the Respondents herein.

Petitioners' RICO claim is grounded upon predicate acts of mail fraud. Specifically, Petitioners allege that the Loan Officers engaged in a scheme to defraud them by luring them to close on a $4,165,000.00 loan made by Fidelity to Kehr Packages with the oral promise that an additional loan in the amount of $185,000.00 would be made to Kehr Packages. (A54). Petitioners allege that Donnelly thereafter made false representations and omissions to them in order to lull them into a false sense of believing that the additional financing promised by the Loan Officers would be forthcoming. (A55, 56). Respondents are alleged to have used the United States mails to send statements setting forth the amount of principal and interest due on the loans from Fidelity to Kehr Packages (A54), and to notify Petitioners that the loans were in default (A56), in furtherance of a scheme to defraud Petitioners.

On January 29, 1990, Respondents moved to dismiss this case. Petitioners filed a response to Respondents' motion to dismiss, together with a motion for leave to file an amended complaint in order to more particularly set forth their RICO and pendent state law claims. Petitioners attached to their motion their proposed amended complaint. The amendment expanded their original one count RICO claim into four separate counts alleging violations of §1962(a) through (d), respectively. (A58-62). The amended complaint dropped the Parent Company and Mario Gianinni as defendants. (A48).

On May 14, 1990, the United States District Court for the Eastern District of Pennsylvania granted Respondents' motion, holding that Petitioners failed to plead facts sufficient to satisfy the "pattern" requirement of RICO. (A42, 47). The District Court denied Petitioners' motion for leave to file their amended complaint because it did not establish a valid RICO claim and failed to cure the deficiencies contained in their original complaint. (A42).

On appeal, the United States Court of Appeals for the Third Circuit affirmed the District Court's dismissal of the case and the denial of Petitioners' motion for leave to file the amended complaint. (A30). *Kehr Packages, Inc., et al. v.*

Fidelcor, Inc., et al., 926 F.2d 1406 (3d Cir. 1991). The Third Circuit rejected Petitioners' claim under §1962(a) because the alleged fraudulent activity was not linked to the use or investment of income in any enterprise. (A10). Petitioners' §1962(b) claim was also dismissed because the proposed amended complaint failed to allege a specific nexus between the control of a named enterprise and the alleged racketeering activity. (A10).[1]

The Third Circuit found that the alleged violation of §1962(c) was deficient on two grounds. First, Petitioners improperly named Fidelity both as the "enterprise" and the "person" engaged in racketeering activity under §1962(c). Because Fidelity could not be a RICO defendant, the Court held that Fidelity cannot be liable under a respondeat superior theory for RICO violations committed by its employees. (A11).

Second, Petitioners did not satisfy the statute's requirement that a "pattern of racketeering activity" be alleged. To reach this result, the Third Circuit focused separately on the alleged deceptive acts of Donnelly and the Loan Officers. It concluded that Donnelly's conduct did not constitute mail fraud and added nothing to the alleged scheme to defraud the Petitioners. (A25). As against the Loan Officers, the Third Circuit held that the amended complaint failed to allege that they engaged in a "pattern of racketeering activity" because it did not contain facts showing long-term criminal activity or a threat of future criminal activity on their part.[2] (A28, A29).

One of the judges on the panel concurred with the dismissal of Petitioners' claims under §1962(a) and (b), but dissented on the dismissal of the claims under §1962(c) and (d).

---

1. Petitioners do not challenge the dismissal of their §1962(a) and §1962(b) claims. They seek only the reinstatement of the portions of the amended complaint which purport to allege violations of §1962(c) and §1962(d), respectively.

2. Having found that Petitioners did not state a claim under §1962(c), the Third Circuit did not consider whether Petitioners' claim under §1962(d) was properly alleged. (A11).

(A30). Although he agreed that the amended complaint did not allege facts showing a threat of future racketeering activity (A34), he disagreed with the majority that the focus is on anything other than the duration of the alleged racketeering activity and its examination of Donnelly's conduct in isolation from that of the other Respondents. (A40).

Petitioners sought and were denied a rehearing en banc. (A41). This petition followed.

SUMMARY OF THE ARGUMENT

The Third Circuit's holding that Fidelity cannot occupy a dual role of a "person" and an "enterprise" under §1962(c) is consistent with the holdings of other Courts of Appeals. The allegation that Fidelity is "associated in fact" with other legal entities and departments within Fidelity does not satisfy the "enterprise" element of §1962(c). The amended complaint fails to establish that the enterprise is an ongoing, continuous organization that has an ascertainable structure distinct from the alleged racketeering activity.

The Third Circuit's application of the RICO pattern requirement to the alleged acts of Donnelly independent of the alleged criminal acts of the Loan Officers is consistent with the guidelines enumerated by this Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). The existence of a "pattern of racketeering activity"—depends upon the circumstances of each case and requires something more than the number and duration of the predicate acts. The predicate acts must be related and amount to or pose a threat of continued criminal activity. When the claim is based upon mail fraud, the multiplicity of otherwise "innocent" mailings does not necessarily transform the underlying fraudulent acts into a pattern of racketeering activity. An examination of the underlying fraudulent conduct is necessary to determine whether the alleged acts form a "pattern of racketeering activity" and fall within the purview of the RICO statute.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. Introduction

In their amended complaint, Petitioners allege that the Respondent Loan Officers engaged in a scheme to defraud them by inducing them to complete the closing of a $4,165,000.00 loan made by Fidelity to Kehr Packages in December of 1986 by orally promising that an additional loan of $185,000.00 would be made to Kehr Packages for working capital (the "Kehr Packages Scheme"). (A54). The Loan Officers left Fidelity in mid-1987 and the responsibility for monitoring the loan was ultimately given to Donnelly. (A54). The amended complaint does not allege that Donnelly promised Petitioners anything or participated in any fraud other than the Kehr Packages Scheme. Rather, Petitioners allege that from July of 1987 through December of 1988, Donnelly lulled them "into a false sense of security in believing that [Fidelity] would fund additional working capital" to Kehr Packages by: (1) telling them that he would review the loan file to determine whether additional funds could be advanced to Kehr Packages; (2) having a liquidation value appraisal done on the machinery and equipment of Kehr Packages; (3) asking Petitioner James McMurtrie for a "plan of attack" to show him how Kehr Packages could be turned around financially and make a profit; (4) failing to tell Petitioners that he worked in the asset recovery group of Fidelity; and (5) disclosing to a buyer interested in the stock of Kehr Packages that the loan made to Kehr Packages by Fidelity was in default. (A54, 55).

The mailing of monthly invoices from Fidelity to Kehr Packages setting forth the amounts of principal and interest due on the loans that were made to Kehr Packages, checks from Kehr Packages to Fidelity for loan payments, and Donnelly's letters to Petitioners, notifying them that the loans were in default, are alleged to have furthered the Kehr Packages Scheme. (A54, 56). The instant petition concerns the sufficiency of Petitioners' claim under §1962(c) of RICO based upon these allegations.

Section 1962(c) of the RICO statute makes it unlawful "for any person employed by or associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. §1962(c). In order to state a claim for a violation of §1962(c), a RICO plaintiff must allege (1) the existence of an enterprise; (2) that persons associated with or participated in the conduct of the enterprise's affairs; (3) through a pattern; (4) of racketeering activity. *Sedima, S.P.R.L. v. IMREX Co., Inc.*, 473 U.S. 479, 489 (1985).

Each of these elements is defined in the statute. A "person" is "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. §1961(3). The term "enterprise" is defined as including "any individual, partnership, corporation or association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4). A "pattern of racketeering activity" requires at least two predicate acts of racketeering activity.[3] 18 U.S.C. §1961(5).

The RICO statute does not define the word "pattern". In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), this Supreme Court held that the "pattern" requirement is satisfied if the predicate acts of racketeering activity are "related" and "amount to, or that they otherwise pose a threat of, continuing racketeering activity," the latter being described as a requirement of "continuity." *H.J. Inc.*, 492 U.S. at 240.

In this case, the Third Circuit reviewed the validity of Petitioners' §1962(c) claims as against each of the Respondents. It found that the amended complaint improperly named Fidelity as both the "enterprise" and a "person" associated with or participating in the affairs of the enterprise through a

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3. Under §1961(1), "racketeering activity" can mean any of the state law or federal offenses enumerated in this section, including mail fraud under 18 U.S.C. §1341. Petitioners' RICO claim is based upon the predicate acts of mail fraud under §1341.

pattern of racketeering activity, and dismissed the §1962(c) claim against Fidelity. (A10, 11). The Third Circuit's holding is consistent with the holdings of other Courts of Appeals.

As against Donnelly, the Third Circuit concluded that the alleged predicate acts did not fall under the purview of the mail fraud statute and, for the purposes of establishing the element of a "pattern of racketeering activity" under RICO, added nothing to the alleged Kehr Packages Scheme or the alleged racketeering activity of the Loan Officers. (A25).

The Third Circuit found that the alleged misrepresentations made by the Loan Officers occurred over a short period of time, were targeted only at Kehr Packages, and showed no threat of further criminal activity. (A25). The Court held that these allegations failed to establish a "pattern of racketeering activity" under RICO. The Court's dismissal of Petitioners' §1962(c) claim against both Donnelly and the Loan Officers is consistent with the principles enumerated by the Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

2. The Third Circuit's holding that Fidelity cannot be both a "person" and an "enterprise" under 18 U.S.C. §1962(c) is consistent with the decisions of other Courts of Appeals.

Petitioners describe the RICO "enterprise" in paragraph 61 of the amended complaint as follows:

> Fidelity Bank, and the parent holding companies, Fidelcor, Inc. and First Fidelity Bancorporation, and the Commercial Loan Department and Asset Recovery Group, together were all associated in fact and formed an enterprise as defined in 18 U.S.C. Section 1961(4). (A58).

The Third Circuit held that Fidelity cannot be named as both the "person" and the "enterprise". Petitioners claim that a conflict exists among the Courts of Appeals as to the components of an "enterprise", and they ask this Court to

resolve this conflict. The conflict perceived by Petitioners, however, simply does not exist.

The circuit courts do not differ on the components of a RICO "enterprise." In each of the cases cited by the Petitioners, the Courts applied the principles set forth by this Supreme Court in *United States v. Turkette*, 452 U.S. 576 (1981) that an "enterprise" must be an ongoing organization that is separate and distinct from the pattern of racketeering activity. The difference in the make-up of the enterprises in those cases before the Courts of Appeals arises from the facts of each case, and nothing more. Indeed, not every RICO enterprise will be comprised of a single entity or a group of individuals.

In *United States v. Turkette*, this Court addressed the issue of whether a group of individuals who formed an association for the purpose of engaging only in illegal activity constituted an "enterprise" under RICO. The Supreme Court held that a RICO "enterprise" reaches both legitimate and illegitimate enterprises. In reaching this conclusion, the Supreme Court stated that §1961(4) of RICO describes two separate categories of associations that fall under the definition of an "enterprise." The first category is those organizations that are legal entities such as corporations and partnerships. The second category encompasses groups or unions associated in fact that are not legal entities. *Turkette*, 452 U.S. at 582.

The "enterprise" alleged in that case fell within the second category of RICO enterprises, that is, a "group of persons associated together for a common purpose of engaging in a course of conduct." *Turkette*, 452 U.S. at 583. The existence of the enterprise, the Court held, must be shown by some evidence of an "ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583.

The Supreme Court further emphasized that under §1962(c), the "enterprise" and the "pattern of racketeering activity" are not one and the same thing. The enterprise is a separate element under §1962(c) and its existence must be

distinct and separate from the alleged racketeering activity. *Id.* at 583.

The Supreme Court set forth the elements necessary to establish an "enterprise" under §1962(c): (1) an ongoing organization whose members function as a continuing unit, and (2) an existence separate and distinct from that inherent in the conduct of racketeering activity. These principles have been consistently followed by the Third Circuit and by other Courts of Appeals.

Since *Turkette* was handed down, the Third Circuit has twice decided cases where the issue of whether the facts were sufficient to show the existence of an "association in fact" RICO enterprise. In *United States v. Riccobene*, 709 F.2d 214, 222 (3d Cir. 1983) *cert. denied* 464 U.S. 849 (1983), the issue was whether an enterprise was formed by the association of various members of a "crime family". The Third Circuit employed the elements set forth in *Turkette* to determine whether the facts in that case were sufficient to sustain a finding that an enterprise existed. Adopting a variation of the *Turkette* test for an "association in fact" enterprise, the Court concluded that the association must have: (a) some guiding mechanism for controlling and directing the affairs of the association; (b) the existence of a continuing unit with associates fulfilling roles consistent with the organizational structure; and (c) an existence beyond what is necessary to engage in racketeering activity. *Riccobene*, 709 F.2d at 222-223.

In *Riccobene*, the Third Circuit found sufficient facts to satisfy all of these elements. The association was a hierarchy presided over by the head of the alleged "crime family"; each member of the "crime family" occupied continuing positions within the group; and the enterprise served as a "clearinghouse" beyond what was necessary to accomplish any single act of racketeering activity charged against the individual defendants. *Id.* at 223-224.

In *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989), the Third Circuit did not refer directly to the holding of *Turkette*, but followed the Supreme Court's direction and

looked to the statutory definition of an enterprise to determine whether sufficient facts were pleaded to show that a group of companies functioned as a continuous triparte unit. *Id.* at 1166.

The Third Circuit's application of the principles set forth in *Turkette* is consistent with the manner in which other Courts of Appeals have applied the "enterprise" elements, enumerated in *Turkette*, to the particular facts. In *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982) *cert. denied* 459 U.S. 1040 (1982) the Eighth Circuit found that facts showing loose patterns of associations among the members, short-lived arrangements, nonparticipation in the planning and organization of the association by various members, and the lack of an overall structure or control over the association demonstrated the absence of an ongoing, structured association that formed an enterprise under RICO.

In *Atlas Pile Driving Co. v. Di Con Financial Co.*, 886 F.2d 986, 995 (8th Cir. 1989), the Eighth Circuit again applied the facts of the case to the principles set forth in *Turkette* but this time found that an association of five interrelated companies that had a distinct structure and an organizational system beyond what was necessary to perpetrate the predicate acts of racketeering activity did form an "enterprise" under the statute. *Id.* at 996.

The Fifth Circuit has engaged in a similar analysis. In *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438 (5th Cir. 1987) *cert. denied* 483 U.S. 1032 (1987), the Court rejected the claim that a bank, its holding company, and three bank employees was an association in fact enterprise, finding no facts to demonstrate that the "enterprise" (comprised of the bank and the holding company) was separate and apart from the alleged racketeering activity of the bank. In addition, there were no facts showing that the bank, the bank holding company and the bank's employees functioned as a continuing unit. The fact that the holding company purchased the plaintiffs' notes from the bank was insufficient to establish the holding company's association with the bank. *Atkinson*, 808 F.2d at 441. In *Montesano v. Seafirst Commercial Corp.*, 818

F.2d 423 (5th Cir. 1987), the Fifth Circuit found that two individuals who joined together to commit one discrete criminal act did not create the type of ongoing association described by the Supreme Court in *Turkette*. *Montesano*, 818 F.2d at 427.

In this case, the Third Circuit's holding that Fidelity cannot be named as both a defendant and an enterprise is entirely consistent both with its prior holdings and with the post-*Turkette* cases handed down in other circuits. Implicit in the Court's holding is that the amended complaint does not allege an "association in fact" enterprise; facts sufficient to demonstrate the existence of an ongoing organization, that is something separate and distinct from the alleged racketeering activity of Fidelity, are absent. In fact, the allegation that the Parent Company and First Fidelity Bancorporation, two members of the alleged "enterprise", did not merge until February, 1988 — in the middle of the alleged Kehr Packages Scheme — negates the existence of an ongoing organization. There is no allegation in the amended complaint that the Parent Company and First Fidelity Bancorporation were associated in any way prior to the merger.

Petitioners' allegation that the Parent Company audited the loans of its subsidiaries, i.e. Fidelity, and that the reports generated by those audits were used by the Respondents to implement the Kehr Packages Scheme further demonstrates the absence of an enterprise. The allegation retracts any inference that the enterprise is separate and distinct from the alleged racketeering activity.

The Third Circuit's dismissal of Fidelity as a RICO defendant is not in conflict with any holding of other Courts of Appeals and is entirely consistent with the holding of *United States v. Turkette, supra*. Accordingly, Petitioners' request for a writ of certiorari on this issue should be denied.[4]

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4. The Court of Appeals, having found no claim under §1962(c), did not consider Petitioners' §1962(d) conspiracy claim and petitioners do not address this issue in their petition. Notwithstanding this, the proposed amended

(footnote continued on next page)

3. The Third Circuit's application of the RICO pattern requirement is consistent with this Court's holding in *H.J. Inc. v. Northwestern Bell Telephone Co.*

Mail fraud is the basis of Petitioners' §1962(c) claims, but the crux of the claims rests upon the allegation that Respondents engaged in a scheme to defraud Petitioners by making false promises that additional financing would be made available to Kehr Packages. (*See* A54, 55). The racketeering activity of the Loan Officers started at the closing of the loan in December, 1987, when they allegedly made the commitment that Kehr Packages would receive the additional financing. It continued for the next seven months until the Loan Officers left Fidelity. During this time and for sometime thereafter, loan invoices and notices of default were sent by Fidelity to Kehr Packages. (A54, 56).

Donnelly is alleged to have engaged in four separate criminal acts after the Loan Officers left Fidelity. First, he told Petitioners that he would review the loan file and asked Petitioner James McMurtrie for a "plan of attack" as part of a scheme to mislead Petitioners to believe that he would "attempt to secure" working capital for Kehr Packages. Second, he obtained a "knock down" appraisal of the assets of Kehr Packages. Third, he failed to disclose to Petitioners that he worked in the asset recovery department of Fidelity. Finally, he delayed in approving the transfer of the stock of Kehr Packages to a potential buyer. (A54, 55).

The Third Circuit found that Donnelly's acts did not fall under the purview of the mail fraud statute. Thus, the Court concluded that only the acts of the Loan Officers were critical to its analysis of the alleged "pattern of racketeering activity" under the principles enumerated by this Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). (A27).

(footnote continued from preceding page)
complaint fails to state a §1962(d) conspiracy claim in that it does not contain any allegations that Respondents agreed to either join the conspiracy or commit the predicate acts. *See United States v. Adams*, 759 F.2d 1099 (3d Cir. 1985) *cert. denied* 474 U.S. 971.

Petitioners contend that the Third Circuit's approach to the pattern inquiry obliterates the concept of "closed-end" continuity as explained by this Supreme Court in *H.J. Inc.* According to the Petitioners, if Donnelly's conduct was bootstrapped to that of the Loan Officers, the alleged predicate acts would have occurred over a nineteen month period rather than the eight month period over which the conduct of only the Loan Officers occurred, continuity would have been satisfied, and a "pattern of racketeering activity" would have been established. In addition, Petitioners argue that continuity should be measured solely by the time period over which the mailings occurred, not the underlying fraudulent acts of the Respondents.

Petitioners overly simplistic durational threshold concept is flawed for two reasons. First, it considers the mailings in isolation regardless of whether criminal activity occurred over that period of time. Second, it bootstraps the innocent conduct of Donnelly to the alleged acts of the Loan Officers in order to satisfy the "pattern" requirement of RICO. This position is not supported by the holding of *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

In *H.J. Inc.*, this Court squarely addressed the standards governing the pattern requirement. Rejecting the proposition that a pattern is established by proving two predicate acts, the Supreme Court stated: "[T]he mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order." *H.J. Inc.*, 492 U.S. at 238. Looking to the legislative history of RICO for guidance, the Supreme Court held that in order to satisfy the "pattern" requirement of the statute, a RICO plaintiff had to show "that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *Id.* at 239.

The concept of relatedness was defined by the Supreme Court as criminal acts that "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240 (citation omitted). The

requirement of "continuity" was troublesome, but was explained as being both a closed-end and open-ended concept. *Id.* at 241.

Closed-end continuity refers to repetitious conduct that extends over a substantial period of time. *Id.* at 241. Open-ended continuity is conduct that is not repetitive, but by its very nature poses a threat of long term criminal activity. *Id.* at 241. Predicate acts in furtherance of a single scheme can constitute a pattern, but only if the acts present a threat of future criminal activity. Predicate acts that span only a few weeks or months and do not threaten future criminal activity do not satisfy the "pattern" requirement. *Id.* at 242.

This Court declined to formulate a test for continuity in the abstract or to fix a period of time over which criminal activity must occur in order to satisfy the element of continuity under its closed-end concept. That task was left to the courts to be decided on a case-by-case basis.

In an earlier decision, the Third Circuit noted that "virtually every garden-variety of fraud is accomplished through a series of wire or mail fraud acts that are 'related' by purpose and spread over a period of at least several months." *Marshall-Silver Construction Co. v. M. Mark Mendel,* 894 F.2d 593 (3d Cir. 1990). Thus, the relatedness test described in *H.J. Inc.* is virtually always satisfied in cases where acts of mail fraud are alleged. But the continuity test is more difficult to apply, especially in cases such as this one where the underlying fraudulent acts do not themselves constitute racketeering activity.

In this case, the alleged criminal activities related to the Kehr Packages Scheme. The mailing of bank statements and notices of default were only happenstance to the scheme. Thus, the critical question before the Court was whether the underlying fraudulent acts, and not the mailings, amounted to or posed a threat of continued criminal activity under the guidelines enumerated by this Court in *H.J. Inc.*

The Third Circuit noted that the Supreme Court did not address this issue in *H.J. Inc.* However, after *H.J. Inc.* was handed down, the Seventh Circuit reviewed for the third time

the issue of whether the existence of multiple predicate acts of mail and wire fraud demonstrated the requisite continuity. In *United States Textiles, Inc. v. Anheuser-Busch Companies*, 911 F.2d 1261 (7th Cir. 1990), the Seventh Circuit reiterated its prior position that "the multiplicity of mailings does not necessarily translate into a 'pattern' of racketeering activity," particularly where the mailings are only incidental to the underlying alleged wrongdoing. *U.S. Textiles*, 911 F.2d at 1268.

In *U.S. Textiles*, since the predicate acts of mail and wire fraud related to the underlying crime of extortion, the focus was on the underlying wrongful acts for purposes of satisfying the continuity test. Similarly, in this case, because the Kehr Packages Scheme was allegedly carried out by the underlying fraudulent acts of the Loan Officers and Donnelly, and not the mailings, the relevant acts for purposes of establishing continuity had to have been the alleged deceptive activities of the Loan Officers and Donnelly.

Petitioners cite no authority to support their position that the test for continuity depends solely on the duration of the mailings in this case. The reason is clear — this Court declined the invitation to develop rigid rules concerning RICO's pattern requirement, preferring the courts to examine the specific facts of each case to determine whether the predicate acts relied upon establish a "pattern of racketeering activity." *H.J. Inc.*, 492 U.S. at 242. It is unlikely that this Court in *H.J. Inc.* would have so wholeheartedly reached this conclusion if closed-end continuity depended solely on the duration of the combined number of mailings as Petitioners contend.

Petitioners also present the novel theory that Donnelly's conduct should have been considered in conjunction with the conduct of the Loan Officers for purposes of evaluating the "pattern" requirement of RICO. The Third Circuit found that Donnelly's conduct did not amount to criminal activity under the purview of the mail fraud statute since the alleged acts could not be "reasonably calculated to deceive a person of ordinary prudence and comprehension." (A21, 22) (citations omitted). It declined to bootstrap the allegations against

Donnelly to the alleged deceptive acts of the Loan Officers for purposes of establishing continuity. To do so would eradicate the intent of RICO to "reach activities that amount to or threaten long-term criminal activity," *H.J. Inc.*, 492 U.S. at 243, n. 4, and subject otherwise innocent persons to liability under RICO who merely by circumstance become entwined in a fraudulent scheme. Certainly Congress did not intend RICO to apply in this manner.

In addition, Petitioners claim that the allegations of their amended complaint meet the requirement of "open-ended" continuity as described by this Court in *H.J. Inc.* They request, however, clarification of the concept of "open-ended" continuity because, in their view, the guidelines set forth by this Court in *H.J. Inc.* are "inadequate to foster a meaningful concept of pattern" in the context of open-ended continuity. (Petitioners brief, p.15).

Petitioners are asking this Court to do what it expressly refused to do in *H.J. Inc.*, that is, to provide a rigid test to determine whether the alleged predicate acts pose a threat of continued criminal activity. In *H.J. Inc.*, this Court made it clear that the specific facts of each case are to be reviewed to determine this issue. *Id.* at 242. But the Court offered some factual examples of how the continuity element might be satisfied. The threat of continuity can be established where "the predicates [are] attributed to a defendant operating as a part of a long-term association that exists for criminal purposes." *Id.* at 242. In other cases, the Court stated, it can be established "where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business." *Id.*

Utilizing these guidelines in this case, the Third Circuit held that the amended complaint showed that the alleged misrepresentations of the Loan Officers, which largely occurred at the closing of the loan to Kehr Packages, were not made to anyone other than Petitioners James and Charles McMurtrie, nor were any other misrepresentations made, and there was no threat that the Loan Officers would have continued to make

false promises after they left their employment with Fidelity. (A28). There were no facts from which it could be even remotely implied that fraud was their "regular way of doing business." (A24).

In *H.J. Inc.*, the Supreme Court emphasized that the concepts of relatedness and continuity, and the methods of proof thereof, cannot be fixed with any degree of certainty. The courts are therefore left with the task of evaluating each case to determine whether the alleged criminal activity meets the pattern requirement of the statute.

The Petitioners here present the question of whether the criminal acts of the Respondents constitute a "pattern of racketeering activity" under RICO. This issue was resolved by the Third Circuit through the use of the principles and guidelines set forth by the Supreme Court. This Court's review of this question resolves no conflict among the courts and would be of no significance or offer further guidance into the scope of RICO.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the writ of certiorari be denied.

Respectfully submitted,

WALTER WEIR, JR., ESQUIRE
Walter Weir, Jr., Esquire

Patterson & Weir
Suite 1200
Land Title Building
Broad and Chestnut Streets
Philadelphia, PA 19110
(215) 665-8181

Counsel for Respondents